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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-576

J. Gordon Edwards, Ph.D., Thomas H. Jukes, Ph.D.,
Robert White-Stevens, Ph.D.,

Petitioners,

v.

National Audubon Society, Inc.,
Robert S. Arbib, Jr., Elvis J. Stahr, Jr.,

Defendants,

and

The New York Times Company, Roland C. Clement,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Justices of the Supreme Court of the United States:

Petitioners, Dr. J. Gordon Edwards, Dr. Thomas H. Jukes and Dr. Robert H. White-Stevens, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing the decision of the United States District Court for the Southern District of

New York, granting a judgment in favor of plaintiffs after a jury verdict awarding Dr. Edwards $21,000 against the New York Times and Roland C. Clement for the Times article and $1.00 against Mr. Clement for the August 14, 1972 letter, and awarding Dr. Jukes and Dr. White-Stevens $20,000 each against the Times and Roland Clement for the Times article and $1.00 each as against Mr. Clement for the August 14, 1972 letter, the total thereof being $61,003.00.

OPINIONS BELOW

1. The opinion of the Court of Appeals is reported at 556 F.2d 113 (2d Cir. 1977).

2. The opinion of the District Court denying the motions of both the New York Times Company and Roland C. Clement for judgments notwithstanding the verdict is unreported, and is reproduced in Appendices B and C of this Petition.

3. The opinion of the District Court denying defendant-appellants' motions for summary judgment is reported at 411 F.Supp. 744 (S.D.N.Y. 1976) and is reproduced in Appendix D of this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 25, 1977. A petition for rehearing with a suggestion for rehearing en banc was filed on June 8, 1977, and denied on July 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether, despite the holdings of this Court in *New York Times v. Sullivan* and subsequent decisions, public figure plaintiffs must prove in order to show actual malice, as ruled by the Second Circuit Court of Appeals, that a libelous article was published with actual knowledge of the falsity thereof?

a. Whether the ruling of the Court of Appeals, requiring such showing of knowing falsity, erroneously severed the second branch of the *Sullivan* test, to wit: "reckless disregard of whether it was false or not?" (376 U.S. at 280.)

2. Whether plaintiffs' rights under the First Amendment to engage in robust and open debate on controversial issues have been unlawfully inhibited and violated by the decision of the Court of Appeals which, in effect, affords an unprecedented and near absolute immunity to the press?

3. Whether, by engaging in a selective review and reevaluation of the evidence adduced at trial, the Court of Appeals has exceeded the proper scope of its appellate jurisdiction in disregard of the judgment of the jury as to issues of contested fact, which judgment was confirmed by the trial court?

4. Whether, assuming that the Court of Appeals, in spite of the considered view of the United States District Court for the Southern District of New York, was justified in finding inconsistencies in the jury verdicts as against both Roland Clement and the New York Times, it is a *non sequitur* to dismiss both verdicts?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, which reads in relevant part:

> Congress shall make no law... abridging the freedom of speech, or of the press; ...

as made applicable to the States by the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioners Drs. Edwards, Jukes and White-Stevens are, and for many years have been, respected members of the scientific community, engaged in the fields of research and education.

For some years these plaintiffs have published articles in various scientific journals criticizing and opposing the scientific validity of the recent ban-DDT campaign. These publications cite evidence of the potentially destructive effects of the proposed ban on both human and avian populations.

National Audubon Society (Audubon), one of the DDT ban's most prominent sponsors, has for decades conducted an annual Christmas Bird Count and, in recent years, has published a statistical analysis in its magazine "American Birds". From the Bird Count statistics, plaintiffs and others have observed a correlation between the increased manufacturing and use of pesticides, including DDT, and increasing bird populations.

In its Foreword to the April 1972 edition of "American Birds" (which was not distributed until July 1972), Robert S. Arbib, editor of this magazine, wrote:

> We are well aware that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals (and other data in AMERICAN BIRDS) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.
>
> This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons.
>
> * * *
>
> With increased local coverage by the press of Christmas Bird Count activities, it is important tha[n] Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of *not more birds, but more birders.* Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about (668e).

During the month of July, 1972, John Devlin, a long-time nature reporter for the New York Times (Times), read this article in American Birds and determined to create a newsworthy and dramatic story by urging Mr. Arbib to supply him with the names of the people alluded to in the Foreword. After two unsuccessful attempts to obtain this information, five names were made available to Devlin by Arbib, who had been furnished a manuscript by Roland C. Clement, Vice President of Audubon, which contained the five names. According to Arbib, Devlin was cautioned that none of the people noted in the Foreword were being called liars by Audubon.

Subsequent to receiving the names from Arbib, Devlin telephoned plaintiffs and Dr. Donald Spencer, who is one of the scientists not a party to this litigation. The substance of these calls was that all the parties concerned flatly denied the truth of the Audubon accusations, and Dr. Spencer characterized the Foreword language as "almost libelous." Ironically, this characterization appeared in the Devlin article.

Despite plaintiffs' indignant reactions to these attacks on their characters, Arbib's disavowal of any defamatory intent, and literature sent by two of the plaintiffs herein to Devlin in support of their views with respect to DDT and the Audubon Bird Count data, Devlin wrote three summaries of his news story, which story appeared as an article on August 14, 1972 in the New York Times, headlined "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." The Times article quoted extensively from the Audubon Foreword, reiterated the "paid to lie" charge, and made brief reference to plaintiffs' reactions thereto.

On the day of the Times publication, Clement drafted a letter to the Times and mailed it over Arbib's signature, after having conferred with Arbib by telephone about its contents. The letter referred to "Jack Devlin's punchy piece" and concluded with the statement: "Nor do we like to call people liars, but. . . ." The next day Clement circulated an internal office memorandum entitled "The Question of Liars" which admitted that "Arbib was probably incautious in giving Devlin the names involved, something he got from me. Devlin probably

asked whom do you consider liars. . . ."

Plaintiffs commenced a diversity action for defamation against Audubon, three Audubon employees and the Times on April 18, 1973 in the United States District Court, Southern District of New York. In December 1975 the District Court denied defendants' separate motions for summary judgment and for certification of the Order denying defendants' motions for summary judgment to permit an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1970).

On June 3, 1976, the matter came on for trial before Judge Metzner and a jury. Prior to the impanelling of the jury, the Court ruled that the publications in question (the Times article and the Clement letter) were libelous *per se* (Tr. 4).

At the trial, Devlin stated that when he asked Arbib for the names of the persons to whom the Foreword referred, Arbib "was reluctant to give the names," and did not do so at that time. When Arbib finally gave the names to Devlin, Devlin recognized one of the named "liars" as a Nobel Laureate. Devlin attempted to contact all five named scientists by telephone. The three who were reached denounced the Foreword, in Devlin's words, as "unfounded, emotional and hysterical" and "almost libelous."

At this point, Devlin did not treat the story as "hot news" and write a story for immediate publication. Devlin wrote three summary versions of his story, taking several days, admittedly a "most unusual" procedure (Tr. 96). The Times article appeared in the April 14, 1972 issue of the newspaper, under the headline "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." Devlin denied having written the headline and, after inquiring as to its authorship, the Times was unable to determine who wrote the headline.

Plaintiffs testified as to their respective professional and educational backgrounds and the events culminating in this lawsuit. Dr. White-Stevens, a professor of biology at Rutgers University, stated that he received a telephone call from Devlin on August 4, 1972, wherein Devlin first brought the accusations in the Foreword to his attention. White-Stevens told Devlin that

the charges contained in the Foreword against him and his associates were not true, and that he was not employed by the pesticide industry.

During the extended phone conversation, White-Stevens explained to Devlin in detail that the Audubon Christmas Bird Count reflected an increase in the bird population based on a bird/per observer calculation based upon Audubon's own published statistics. These rather simple statistical tabulations were in Devlin's possession before he wrote the August 14 article.

Troubled by Devlin's stated intention to publish this story in the New York Times, Dr. White-Stevens sent a letter to Devlin on August 8 which listed the names of other scientists who would confirm Dr. White-Stevens' position on the matter and included the statistical tabulations noted above.

Dr. Edwards, a professor of entomology at San Jose State University testified that according to his field and research studies over a twenty-year period, the advent and use of insecticides had caused no reduction in bird populations. He stated that he had never been in the employ of any chemical company.

The last plaintiff to testify was Dr. Jukes, a professor of medical physics at the University of California at Berkeley. Also contacted by Devlin after the publication of the Audubon Foreword, Dr. Jukes reiterated his colleagues' position that on a "per observer" basis, the number of birds had increased over a ten-year period, despite exposure to insecticides. Thus, prior to the preparation of any article by the Times, Devlin's conversations with plaintiffs showed that the Audubon charges were squarely contravened by plaintiffs' denials and by supporting literature, including Audubon's own data.

Plaintiffs also called Maurice Freedman, the coordinator of Technical Services at the New York Public Library, as an expert witness in library science to testify that the daily domestic circulation of the August 14, 1972 edition of the New York Times was nearly one million copies. Additionally, he stated that most libraries carry the Times on microfilm for subsequent

research use by scholars and academicians. Philip Marvin, a crop protection consultant and author of various treatises dealing with the Audubon Christmas Bird Counts, testified on behalf of plaintiffs that the accusations in the Audubon Foreword were untrue. Two of his publications which focused specifically on bird population increases over a 20-year period on a "per observer" basis were sent to Devlin by plaintiffs before the Times article was printed. Notably, Marvin stated that he had participated in the bird counts and was familiar with the observation techniques employed. There was no effort made during the trial by defendants to challenge the truth of plaintiffs' analysis of Audubon's Christmas Bird Counts.

Victor Yannacone, an attorney who was one of the initial founders of the Environmental Defense Fund (EDF), testified on behalf of plaintiffs that since EDF became funded by Audubon, he had personal knowledge of Roland Clement's role as trustee and technical assistant of EDF. He stated that during meetings between Clement, himself and Dr. Charles Wurster, a research scientist for EDF, plaintiffs' names were discussed in connection with EDF's efforts to advance its anti-pesticide policy. Clement was present when the subject of silencing Dr. Jukes was proposed by destroying his scientific credibility. The tactic discussed by Yannacone, as reviewed by Clement, among others, was to induce scientists to testify during environmental litigation and to attempt to get them to commit themselves to untenable positions. The tactic was to then launch a "smear" campaign by providing the press with transcripts of their cross-examination, highlighting the inconsistencies thereof.

Arbib, the author of the Foreword, testified for Audubon that he told Devlin during their initial conversation that the Foreword was a "generalized warning" and that he had no specific names in mind when Audubon published the Foreword. The subsequent source of the names was a manuscript by Clement which Clement furnished Arbib. During the third phone call from Devlin, Arbib finally gave Devlin the names with a disclaimer that "I made it very clear to him that under no circumstances was he to say that we were calling Mr. Jukes a paid liar or Dr. White-Stevens a paid liar or anything like that."

Devlin was told that plaintiffs' names were to be used only in connection with Audubon's charge that certain scientists had misinterpreted the bird count information. Arbib also stated that he disagreed with the substance of Clement's August 14th letter to the Times, especially to the use of such phrases as "Devlin's punchy piece." Despite Arbib's objections expressed to Clement that the letter misrepresented Arbib's views about the Times article, the letter was sent over Arbib's signature by Clement.

Clement testified that in his "overview function of the scientific validity of Audubon Society positions," he reviewed the draft of the Foreword and suggested adding the words "or parroting something they know little about," following the "paid to lie" accusation. However, he did nothing further to soften the tone of the Foreword, and did not suggest that the "paid to lie" phrase be stricken. Clement testified that Dr. Spencer was dishonest and that plaintiffs were incompetent. However, when specifically asked on what basis he objected to plaintiffs' use of the Audubon bird count data, Clement was unable to identify any instance of misuse or misinterpretation.

Audubon next called Dr. Wurster to rebut Yannacone's testimony and then rested. Times called no witnesses. Before instructing the jury, Judge Metzner dismissed the action against Audubon with respect to the American Birds Foreword, because it made no reference by name to plaintiffs. The case was then submitted to the jury under instructions that the Times article and Clement letter were libelous *per se*. The jury returned a verdict against the Times and Clement for $61,000, and an additional verdict for $3.00 as against Clement.

After the verdict was rendered, defendants filed motions for judgment notwithstanding the verdict, which the Court denied. The Court held that, upon a review of the evidence, the jury was fully justified in finding that the Times and Clement were liable for transforming, with reckless disregard for the truth, a nonactionable publication in American Birds into one that was clearly libelous as appeared in the August 14, 1972 edition of the New York Times.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS AN UNWARRANTED DEPARTURE FROM THE DECISION OF THIS COURT IN *NEW YORK TIMES v. SULLIVAN* AND SUBSEQUENT DECISIONS WITH RESPECT TO MATTERS INVOLVING FIRST AMENDMENT-PUBLIC FIGURE-RECKLESS DISREGARD ISSUES

New York Times v. Sullivan, 376 U.S. 254 (1964), gave recognition to the proposition that in order for a public official to prevail in a libel action for defamatory statements made by the news media with respect to his official conduct, he must prove clearly and convincingly that the publication was made with actual malice—with knowledge that the statement was false or with reckless disregard of whether it was false or not. *Id.* at 279-280. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the opinion of the Court emphasized the necessity for a showing that a false publication had been made with a "high degree of awareness of probable falsity." *Id.* at 74. This same burden of proof was applied to public figure plaintiffs in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). One year later this Court further defined actual malice by saying:

> Reckless conduct is not measured by whether the reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *St. Amant v. Thompson*, 390 U.S. 727 (1968).

In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), this Court reviewed a judgment against Time magazine in light of these earlier holdings and held that Time's failure to state that the United States Commission on Civil Rights had based its report merely

on the allegations contained in a private complaint was insufficient to sustain a jury finding of actual malice. However, the Court of Appeals in the case at bar has extended *Pape* by creating a new level of privilege in the reporting of charges against a public figure "regardless of the reporter's views regarding their validity" (Slip Opinion at 3769).

Taken together, these cases affirm the principle that the First Amendment guaranty of freedom of the press demands that some constitutional protection be afforded the news media against defamation suits by public officials and public figures if the people are to remain informed on issues of national significance. Thus, in the words of Justice Brennan:

> Debate on public issues should be uninhibited, robust and wide-open; thus, some erroneous statements must be protected as inevitably arising from the exercise of First Amendment rights. A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions leads to self-censorship. *New York Times v. Sullivan, supra* at 270, 279.

Simply stated, it now seems well-settled that, except for plaintiffs who are not public figures, a verdict based on mere negligence is constitutionally impermissible in defamation litigation. *Gertz v. Welch*, 418 U.S. 323 (1974).

In reversing the judgment of the District Court in the case at bar, the United States Court of Appeals for the Second Circuit has made an unwarranted and unprecedented departure from these governing principles by effectively reading out of existence the second branch of the *New York Times v. Sullivan* rule—reckless disregard.

An impartial review of the abundant evidence upon which the jury finding of actual malice against the Times and Roland Clement was based should have been sufficient for the Court of Appeals to sustain the jury verdict. It is noted that Judge Metzner's denial of both defendants' motions for judgment notwithstanding the verdict fully explained the determination of the jury with respect to the evidence adduced at trial.

Devlin's journalistic background leaves no doubt that as a nature reporter of several years he was aware that Audubon published annual Christmas Bird Count data which was used by ornithologists and scientists alike to support antagonistic positions on the effects of the proposed ban on the use of DDT. In light of his knowledge of the acerbic nature of the controversy, Devlin, more than other news reporters, must have known from the beginning that his proposed article was potentially libelous. Indeed, the Court of Appeals concedes as much:

> The appellees were charged with being 'paid to lie.' It is difficult to conceive of any epithet better calculated to subject a scholar to the scorn and ridicule of his colleagues than 'paid liar.' It is this completely foundationless accusation of venality that constitutes the essence of the calumny against the appellees. (Slip Opinion at 3773).

Granting that the Times has published a libelous article, it becomes essential to examine Devlin's motives and overt behavior in proceeding intemperately to publication in the face of abundant warnings, strongly suggesting a more prudent course of action. It is uncontroverted that Arbib refused Devlin's initial requests to provide him with the names of those referred to in the Audubon Foreword. Only at Devlin's persistent urging did Arbib reluctantly respond to Devlin's repeated inquiries. There was conflicting testimony as to whether Arbib cautioned Devlin about not using plaintiffs' names in the context of the "paid liar" accusation. Devlin shifted from certainty that no such caveat ever issued, to confusion when confronted with his deposition testimony which revealed that he recalled that Arbib had said he thought it might be better not to use the names. Arbib's recall of the telephone exchanges between him and Devlin stands in sharp relief to Devlin's faded memory.

Despite the evidence that Devlin had been amply forewarned by Arbib, by the plaintiffs themselves, and by the literature sent to him on the subject of insecticides and bird

populations, the Court of Appeals held that since Devlin ". . . in good faith elicited both sides of the story to the best of his ability. . . the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity (because) . . . we do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth." (Slip Opinion at 3764, 3769, 3770).

This legal conclusion is unjustifiable both in fact and in law. Much less egregious conduct on the part of the defendant-publisher in *St. Amant v. Thompson, supra,* prompted the Court to say:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements made were true. The finder of fact must determine whether the publication was made in good faith. Professions of good faith . . . will [not] be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *See also, Oliver v. Village Voice, Inc.,* 417 F.Supp. 235 (S.D.N.Y. 1976).

Thus, when the Court of Appeals finds that Devlin's motives in republishing the original accusations were to avoid unnecessary injury to eminent persons by Audubon's attack (Slip Opinion at 3763), it is pertinent to question why, if this was his concern, he published the article despite his knowledge that plaintiffs were not associated with the pesticide industry.

Similarly, the Court in *Time, Inc. v. Pape, supra* at 286, demonstrated its awareness of the precise problem at hand—the reworking of a statement neutral on its fact into a defamatory attack:

> Where the source [of the news] has engaged in

> qualifying the information released, complexities ramify. Any departure from full, direct quotation of the words of the source, with all its qualifying language, confronts the publisher with a set of choices.

For the Court of Appeals to find, on the one hand, that Arbib "never intended to portray anyone in particular as a venal prevaricator" (Slip Opinion at 3762), and then proceed to the conclusion that the "Times article. . .was the exemplar of fair and dispassionate reporting" (Slip Opinion at 3770), is manifestly inconsistent with the evidence from which the jury might have found that Devlin was dubious of the accuracy of Audubon's allegations, and that he entertained serious doubts concerning whether plaintiffs were paid liars.

The Court of Appeals also refused to follow the "reckless disregard" branch of the *New York Times v. Sullivan* actual malice definition by exculpating Clement from liability:

> There is scarcely a wisp of evidence in the record from which it could be inferred that... Clement supplied Arbib with appellees' names, *knowing* they would be portrayed as 'paid liars'. (Slip Opinion at 3773).

No reported case has yet held that the *only* method of proving actual malice is by showing that a publication was made with knowledge that the statement was false. Indeed, the wisdom of defining actual malice in terms of reckless disregard as well as knowing falsity lies in the fact that in defamation cases liability must often be predicated on the gross abandon with which one treats the truth.

Until this time, it would have been sufficient to prove that Clement supplied Arbib with plaintiffs' names with reckless disregard as to whether they would be portrayed as paid liars. At present, the state of the law appears unclear, and, if allowed to remain undisturbed, the opinion of the Court of Appeals will serve as precedent for a principle never contemplated by this Court.

II.

THE DECISION OF THE COURT OF APPEALS RAISES IMPORTANT QUESTIONS CONCERNING THE RIGHTS OF PUBLIC FIGURES UNDER THE FIRST AMENDMENT TO ENGAGE IN ROBUST AND OPEN DEBATE ON CONTROVERSIAL ISSUES WITHOUT FEAR OF DESTRUCTIVE REPRISALS FROM INDIVIDUALS, WHOSE VIEWS ARE ENDORSED BY THE MEDIA

The individual's right to protection of his own good name is entitled to recognition as a basic of our constitutional system. *Gertz v. Welch,* 418 U.S. 323, 341 (1974), citing with approval *Rosenblatt v. Baer,* 383 U.S. 75, 92 (1966). Moreover, the guarantees of freedom of speech and press belong to individuals in their own right to make their thoughts public and put them before the community. Likewise, they are a social necessity required for the maintenance of our political system and an open society. *Curtis Publishing Co., v. Butts* 388 U.S. 130, 149 (1967). In *Butts,* this Court expressed its views favoring a public policy imposing acceptable limitations which "neither affect the impartial distribution of news or ideas . . . nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish." *Id.* at 150-151.

In *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), the constitutionality of a state "right to reply" statute was challenged under the First Amendment. Weighing carefully the view urged by appellees that "the First Amendment interest of the public in being informed [was] in peril because the 'marketplace of ideas' [was becoming] a monopoly controlled by the owners of the market," the Court held that any *governmental* compulsion to publish was violative of the First Amendment because it operated as an interference with the exercise of editorial control and judgment. *Id.* at 258.

By design, the rule of *Miami Herald* is limited to a set of facts which involves state encroachment upon the freedom of the press by exacting a criminal penalty for failing to provide

equal space for political candidates to reply to criticisms and attacks on their records. To argue in the case at bar that no infringement of the First Amendment rights of plaintiffs could ever occur in light of *New York Times v. Sullivan,* as did the Times in its reply brief to the Court of Appeals, is to suggest a far broader application of the *Miami Herald* holding than has been as yet contemplated. In this same regard, retraction statutes have been struck on the ground that they violate the Due Process Clause of the Fourteenth Amendment since they mandate that recovery of damages in libel cases is contingent upon proof that a demand for retraction was made and refused. *Holden v. Pioneer Broadcasting Co.*, 365 P.2d 845, *cert. denied,* 370 U.S. 157 (1962). Indeed, Justice White in his concurring opinion in *Miami Herald* wrote:

> The press is the servant, not the master, of the citizenry, and its freedom does not carry with it an unrestricted hunting license to prey on the ordinary citizen. *Id.* at 263.

Thus, since it has been stated that "there is no constitutional value. . .in the intentional lie or careless error," *Gertz v. Welch, supra* at 340, and that such false statements made with reckless disregard of the truth enjoy no constitutional protection, *Garrison v. Louisiana, Supra* at 75 (1964), *Buckley v. Littell,* 539 F.2d 882, 882, 893 (2d Cir. 1976), it follows that the First Amendment does afford shelter to the individual who voices his opinion to the public as against unfounded character assassinations by other individuals and the press. Otherwise, the expression of unpopular positions would become an exercise only to be undertaken after attempting to gauge the destructive consequences that would surely flow from those whose resources to influence the public are virtually overpowering.

The decision of the Court of Appeals in this case goes far towards discouraging a climate of open and robust debate which the Court in *New York Times v. Sullivan* asserted as essential to an ordered society. We are in complete agreement that "a democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their

ability to intelligently govern themselves." (Slip Opinion at 3758-3759). Implicit in this pronounciation is the fact that the maintenance of informed judgment depends upon the transmission of *all* responsible points of view on issues over which such sharp debate has persisted for so many years.

This societal requirement is particularly imperative when such governmental functions as shaping our environmental policy would be seriously impaired by lack of access to information which would be withheld through fear of exposure to public ignominy. Fundamentally, the question is whether, without equal protection of the First Amendment rights of individuals, we can afford to cloak the press with the awesome responsibility of acting as the ultimate filtration process through which all ideas must pass, allowing it unfettered discretion to decide which points of view are worthy of approval, and which individuals and ideas are to receive the punitive sanctions of adverse personal publicity. If we are to afford the press such latitude as suggested by the Court below, may we rest assured that, after having made such judgment, the press will maintain a neutral and disinterested perspective in its reporting? We suggest that such a question can only be answered in the negative.

Plaintiffs, as responsible advocates of a minority position with respect to an issue of national significance, chose to disseminate information to the public in an effort to provide some enlightenment as to their interpretation of Audubon's published statistical bird count data. Plaintiffs have no quarrel with the flexibility and breathing space permitted by the law with respect to critical evaluation of ideas in the context of a sharply divided controversy. To the contrary, it is precisely this toleration of acceptable levels of disagreement that encourages and stimulates the heightened awareness with which informed decisions can be made.

However, when criticism degenerates into wanton *ad hominem* attack by a major journalistic entity, and an officer of a nationally prominent naturalist organization, without providing legal redress for demonstrable permanent injury to the

reputation of plaintiffs, the end result may well be to stifle the creative exchange of ideas which the First Amendment seeks to protect as sacrosanct.

Plaintiffs do not propose, as the Court of Appeals suggests, that "the press [must] take up cudgels against dubious charges in order to publish without fear of liability for defamation." (Slip Opinion at 3770). Indeed, it is elementary that the press cannot act as both ultimate arbiter of truth and as dispassionate disseminator of information. However, the position taken by the Court of Appeals that "the public interest in being fully informed . . . demands that the press be afforded the freedom to report such charges without assuming responsibility for them" (Slip Opinion at 3770) strongly implies that the press has no obligation whatsoever to investigate the accuracy of the source of its news. Such sweeping immunity from defamation liability would have the ironic effect of operating as a prior restraint upon all of those who would be silenced by the fear of irresponsible and overwhelming countercharge.

Plaintiffs contend that the First Amendment guarantees of freedom of speech and press are by no means mutually exclusive or irreconcilable. *New York Times v. Sullivan* wisely recognized that some friction is inevitable in our society since the democratic process can derive sustenance only from constant exposure to ideological conflict. In support of this fundamental policy judgment, the press has been provided adequate protection from defamation liability by an evidentiary burden imposed upon public figures which permits wide latitude in the exercise of editorial judgment. Nevertheless, no justification exists for licensing the press to launch with impunity indiscriminate attacks on the professional integrity of respected members of the scientific community such as plaintiffs. Consequently, we invite this Court to reaffirm its commitment to the accommodation of the concomitant exercise of these two vital liberties so that no exorbitant price is exacted from either the press or the individual.

III.

THE COURT OF APPEALS, BY ENGAGING IN A SELECTIVE REVIEW AND REEVALUATION OF THE EVIDENCE ADDUCED AT TRIAL, HAS EXCEEDED THE PROPER SCOPE OF ITS APPELLATE JURISDICTION BY DISREGARDING AND DOWNGRADING CRITICAL ELEMENTS OF PROOF OF RECORD SUPPORTIVE OF THE JURY VERDICT AND OF THE POST-TRIAL RULING OF THE TRIAL COURT, AND BY FASHIONING, *ARGUENDO*, ELEMENTS OF PROOF NOT PRESENT IN THE RECORD OF THIS PROCEEDING

In *New York Times v. Sullivan, supra* at 285, the Court stated that its:

> . . . [d]uty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. [T]he rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see. . .whether they are of such a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' We must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

This rule of "record examination" to determine whether the evidence in libel cases can constitutionally support a judgment has been followed consistently. *Time, Inc. v. Pape,* 401 U.S. 279 (1971); *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 398 U.S. 6 (1970); *St. Amant v. Thompson,* 390 U.S. 727 (1968); *Beckley Newspapers v. Hanks,* 389 U.S. 81 (1967); *Guam Federation of Teachers Local 1581 (AFT) v. Ysrael,* 492 F.2d 438 (9th Cir.), *cert. denied,* 419 U.S. 872 (1974).

However, it is equally indisputable that where a result has been reached on the trial court level which finds reasonable support in the record, it is for the jury, not for an appellate court, to determine whether there was knowing or reckless falsehood. *Time, Inc. v. Hill,* 385 U.S. 374, 394 (1967); *Carson v. Allied News Co.,* 529 F.2d 206 (7th Cir. 1976). Any other rule would undermine the principles of *res judicata* and finality of judgments which are essential to an orderly administration of justice. These guidelines were followed by the District Court.

At the close of the discovery phase of this litigation, defendants moved for summary judgment on the ground that plaintiffs had failed to raise a disputed genuine issue as to actual malice. In denying defendants' motions, Judge Metzner reviewed the depositions of the parties and the prospective witnesses and concluded that significant factual disputes existed with respect to the "state of mind and good faith of defendants in publishing a charge that plaintiffs were lying" (95a). Defendants then moved the District Court to grant an immediate interlocutory appeal from its order denying the motions for summary judgment. The Court adhered to its original order, thereby denying the request for certification, and correctly stated that since Arbib had testified in deposition that he warned Devlin against calling plaintiffs paid liars, which Devlin flatly denied, the Court could not usurp the essential jury function of making a factual determination on the issue of actual malice. Consequently, the District Court in the first instance recognized that this case involved a judgment as to the credibility of two witnesses and, as such, plaintiffs were entitled to a determination by the jury.

In reversing the verdict of the jury rendered against the Times and Clement, the Court of Appeals chose to accord great significance to certain crucial elements of evidence and to disregard other such elements in reaching the decision that both defendants lacked the requisite state of mind for defamation liability under the prevailing rules of law.

A. As to the Times.

For the jury to have held the Times liable in this case, it must have disbelieved Devlin's protestations that he sought to

publish plaintiffs' names because "many eminent persons associated with the pesticide industry might be unnecessarily hurt by the Society's indiscriminate attack." (Slip Opinion at 3763). That the Court of Appeals finds as a fact such self-serving testimony flies in the face of reason and the evidence. It is appropriate to ask the following question: if Devlin was concerned about protecting the reputations of persons who might be unjustifiably injured by the Audubon accusations, how were his motives furthered by publishing the names of people who told him that they were likewise unassociated with the pesticide industry?

Similarly, the Court of Appeals' acceptance of Devlin's testimony that Arbib never cautioned him against the use of plaintiffs' names in connection with the "paid liar" epithet is unsupported by the record. At trial, Devlin could not even remember the details or chronology of the telephone conversations with Arbib. His recall as to whether Arbib warned him against using plaintiffs' names in the Times article was so abysmal that the only reliable source of information on this issue was Devlin's deposition testimony, which revealed that the warning had in fact issued from Arbib. In striking contrast, Arbib repeatedly asserted that he had emphatically urged Devlin not to publish plaintiffs' names in conjunction with excerpts from the Foreword because it had been authored with no specific names in mind.

In the same vein, the Court of Appeals stated that "(Devlin) testified that Arbib made it clear that the scientists whose names were furnished to the Times were the persons referred to in Arbib's 'Foreword' to American Birds" (Slip Opinion at 3764). A thorough search of the records fails to disclose the existence of such testimony from Devlin. Moreover, Arbib clearly remembered telling Devlin that the factual basis for the Foreword was hearsay information that somebody was engaging in misinterpretation of the Audubon bird count data.

Further evidence that Devlin was alerted to the baselessness of Audubon's charges was provided by plaintiffs to Devlin in the form of both scholarly and popular literature which

commented specifically on the reliability and interpretation of the bird count data. As to this information, the Court of Appeals found that "none of the material responded directly to Audubon Society's criticism of the use of its bird count data..." (Slip Opinion at 3764). However, Devlin acknowledged receipt of an article written by Philip Marvin which posited that the data showed a steady growth in bird populations despite the increased usage of modern insect and weed control chemicals (680c). Also an article written by Roger Tory Peterson, the 1971 Audubon Medalist, stated that the bird counts, analyzed intelligently, were "excellent indicators of the environment—a sort of ecological litmus paper" (687e). Additionally, well prior to the Times publication, Dr. Jukes supplied Devlin with the table of bird count data and a summary of hawk migration showing a tripling of hawk species sighted at a flyway observatory in Pennsylvania.

While finding little difficulty in discrediting evidence which could have supported the jury finding of actual malice, the Court of Appeals with equal ease apparently overlooked other items of evidence which also permitted the conclusion that the Times published the libelous article with serious doubts as to the truth contained therein. For example, it is uncontroverted that Devlin did not treat this story as fast-breaking news which required immediate publication. Instead, several days elapsed between Devlin's reading of the Foreword and the appearance of the Times article, during which time Devlin prepared three summaries of the story. Of significance is Devlin's manifest ambivalence with respect to the use of the word "liar" as evidenced by the fact that, of the three summaries, one of them does not contain this word. At trial, Devlin could offer no explanation for his omissions and/or insertions as the story evolved into print.

The Court of Appeals had no quarrel with the ruling of the District Court that the Times article was libel *per se*:

> ... [T]o call the appellees, all of whom were university professors, *paid liars* clearly involves defamation that far exceeds the bound of the prior

> controversy. No allegation could be better calculated to ruin an academic reputation. And, to say a scientist is *paid to lie* implies corruption, and not merely a poor opinion of his scientific integrity. Such a statement requires a factual basis, and no one contends there was any serious basis for such a statement in this case. (Slip Opinion at 3772, n. 5).

However, despite Arbib's warnings, plaintiffs' denials of the charges, their supporting literature and Devlin's own hesitation in labelling plaintiffs as liars, the Court of Appeals found:

> ... that Devlin was unaware of the baselessness of the Audubon Society's dramatic allegations. Nor was there a shred of evidence from which the jury might have found that Devlin entertained serious doubts concerning the truth of Arbib's charge that the appellees were 'paid liars' (Slip Opinion at 3771).

B. As to Clement.

The characterization and evaluation of the evidence by the Court of Appeals with respect to Clement's role in this case is likewise circumspect. Clement's active participation in the preparation of the Foreword, his prior commitment to silencing plaintiffs through EDF litigation, the August 14, 1972 letter to the Times and his willingness to cast opprobrium on plaintiffs, even at trial, all reflect a state of mind bent on vilification. Yet the Court of Appeals portrays Clement as "astonished" by the Times article, and finds that his motivation for the letter was to "play down" the Audubon accusation, all without having observed Clement's contempt for and hostility towards plaintiffs throughout the proceedings.

Likewise, the Court's appraisal of Clement's letter to the Times as having "eschewed all the suggestions of venality that had appeared in the American Birds Foreword and Times article" (Slip Opinion at 3768) was made without consideration of the totality of the evidence offered to prove his liability and in disregard of the plain meaning of common vocabulary. It is

self-evident that had Clement wanted to convey unequivocally his lack of defamatory intent, he would have said so in his letter. Rather, it opens with a phrase qualifying, not repudiating, the offensive language in the Foreword.

Plaintiffs also find disconcerting the implication that Clement's omission of the word "paid" before "liar" in his letter to the Times avoids any injurious connotation as to plaintiffs' reputations. It does violence to the English language to suggest that the use of the word liar, standing by itself, is an expression of opinion rather than an accusation, and, as such, cannot be libelous. Furthermore, the law of New York recognizes no such distinction. *Nichols v. Item Publishing Co.*, 309 N.Y. 596, 132 N.E. 2d 860 (1956).

Most disturbing is the finding that "there is scarcely a wisp of evidence in the record from which it could be inferred that . . . Clement supplied Arbib with appellees' names *knowing* they would be portrayed as paid liars." (Slip Opinion at 3773). Unlike Arbib, Clement was undeterred by Devlin's insistence and when asked by Arbib for plaintiffs' names, he simply passed one of his own articles on to Arbib without a word of caution.

It takes little imagination to realize that the Times' sole interest in a story of this nature was in linking specific names to the dramatic accusation that certain scientists were being paid to lie. Since Clement provided Arbib with plaintiffs' names in the first instance, he was the operative force behind the Times article, and his assistance was the *sine qua non* of that libelous publication.

The most persuasive evidence of Clement's intent to portray plaintiffs as paid liars was the testimony of Victor Yannacone, Jr., who placed Clement at EDF board conferences participating in discussions to destroy the scientific credibility of EDF opponents, including Drs. Jukes and White-Stevens. However, in relegating this evidence to a footnote in its opinion and implicitly deprecating Yannacone's credibility as a witness, the Court of Appeals has again undermined the fact-finding function of the jury.

We ask that this Court recognize that in this case the outer limits of appellate review of jury verdicts have been exceeded and, more importantly, to prohibit appellate courts from overturning verdicts in libel cases when ample evidence therefor exists in the record.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

APPENDICES

Appeal from a judgment of the United States District Court for the Southern District of New York, Charles M. Metzger, *J.*, entered after a jury trial, awarding aggregate damages of $61,003 for defamation to the appellees, and from prior orders denying summary judgment, denying a directed verdict, and denying judgment notwithstanding the verdict.

Reversed. Judgment for defendants-appellants dismissing the complaint.

FLOYD ABRAMS, New York, N.Y. (Eugene R. Scheiman, Ruth D. MacNaughton, and Cahill Gordon & Reindel, New York, N.Y., of counsel), *for Defendant-Appellant New York Times Company.*

MORRIS ZWEIBEL, Mineola, N.Y. (Gifford, Woody, Carter & Hays, New York, N.Y., and Crowe, McCoy, Agoglia, Fogarty & Zweibel, P.C., Mineola, N.Y., of counsel), *for Defendant-Appellant Roland C. Clement.*

THOMAS A. ROTHWELL, Washington, D.C. (Arthur H. Berndtson, and Rothwell, Capello & Berndtson, Washington, D.C., of counsel), *for Plaintiffs-Appellees.*

KAUFMAN, *Chief Judge:*

In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet. It is elementary that a democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their ability to intelligently

govern themselves. As we said in *James* v. *Board of Education,* 461 F.2d 566, 572, "To preserve the 'marketplace of ideas' so essential to our system of democracy, we must be willing to assume the risk of argument and lawful disagreement." In the thirteen years since *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), the federal courts have steadfastly sought to afford broad protection to expression by the media, without unduly sacrificing the individual's right to be free of unjust damage to his reputation. *See, e.g., Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974); *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971); *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971); *St. Amant* v. *Thompson,* 390 U.S. 727 (1968); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967). This important case requires us to return again to this task.

We are invited today to affirm a libel judgment against the *New York Times* for accurately reporting dramatic statements of the National Audubon Society attacking the good faith of prominent scientists supporting continued use of the insecticide DDT. There can be little doubt that the *Times* reasonably considered these accusations of a leading environmentalist organization to be newsworthy. We are further requested to affirm judgments against Roland Clement, a Vice-President of the Society, despite the absence of any evidence in the record that he endorsed or made the single statement that could be found to have been libelous under the Constitution. We are convinced that the First Amendment requires us to decline these invitations. Accordingly, we will reverse and order the complaint dismissed.

I.

A brief summary of the facts is indispensable to understanding the difficult legal issues presented by this appeal.

The DDT debate. The publication fifteen years ago of

Rachel Carson's *Silent Spring* set off a furious controversy that, even today, continues to rage around the insecticide DDT. Naturalists and environmentalist groups like the National Audubon Society have vigorously opposed DDT because, in their view, use of the chemical endangers bird life. Proponents of the pesticide deny this charge and forcefully urge that, without DDT, millions of human beings will die of insect-carried diseases and starvation caused by the destruction of crops by insect pests.

As might be expected when such fundamental questions of value enter the debate, at times the DDT controversy has exceeded the limits of temperance and good manners. Naturalists have insinuated that many proponents of DDT are unduly influenced by the selfish interests of the pesticide industry. On the other hand, such an outstanding advocate of DDT as appellee Dr. J. Gordon Edwards, has characterized a ban on export of the insecticide, supported by the Audubon Society, as "deliberately genocidal." [1] Accusations of scientific bad faith have unfortunately become almost commonplace on both sides.

Arbib's "Foreword" to American Birds. The scientists who advocate continued use of DDT respond to charges that the chemical destroys bird life by citing the annual Audubon Society Christmas Bird Count, which shows a steady increase in bird sightings despite the growing employment of pesticides in the last thirty years. The Audubon Society believes this is an invalid use of its statistics, because there are many more bird counters now and because bird watchers have grown more skilful in recent years with better access to observation areas. This dispute over the interpretation of the Society's statistics lies at the heart of the controversy over DDT's threat to bird life.

1 Edwards, Address to the 71st National Meeting of the American Institute of Chemical Engineers (February 23, 1972).

By 1972 the DDT controversy was raging at peak intensity,[2] and the Audubon Society was acutely alarmed at what it considered the persistent misuse of its Bird Count data. Accordingly, Robert S. Arbib, Jr., a highly respected amateur ornithologist and editor of the Society's publication *American Birds,* determined to preface his report of the 1971 Christmas Count with a warning against distortion of the results. His foreword to the April, 1972, issue of *American Birds,* contained the following comment on the Count's significance:

> We are well aware that segments of the pesticide industry and certain paid "scientist-spokesmen" are citing Christmas Bird Count totals (and other data in AMERICAN BIRDS) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.
>
> This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this. In addition, with the constant diminution of natural habitat, es-

2 In March, 1972, seven months of administrative hearings on the deleterious effects of DDT use were concluded, and the Administrator of the Environmental Protection Agency, William D. Ruckelshaus, was personally struggling with the question whether to ban DDT. On June 14, 1972, Ruckelshaus revoked the registration of DDT for most purposes and ordered that use of the pesticide should be discontinued by December 31 of that year. This order was eventually affirmed by the United States Court of Appeals for the District of Columbia Circuit. *See Environmental Defense Fund* v. *E.P.A.*, 489 F.2d 1247 (D.C. Cir. 1973).

pecially salt- and freshwater marshes, it is self-evident that species frequenting these habitats are less common than formerly.

The apparent increases in numbers of species and individuals on the Christmas Bird Counts have, in most cases, nothing to do with real population dynamics. They are the result of ever-increasing numbers of birders in the field, better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.

With increased local coverage by the press of Christmas Bird Count activities, it is important that Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of *not more birds, but more birders.* Any time you hear a "scientist" say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about.

Despite the potentially explosive character of the allegation that scientists supporting DDT were paid liars, Arbib does not appear to have had any factual basis for the charge. Indeed, he testified that his comment was never intended to portray anyone in particular as a venal prevaricator; rather, it merely expressed his belief that many supporters of DDT use were spokesmen for the pesticide industry.

The New York Times Article. Arbib's general accusations came to the attention of *New York Times* nature reporter John Devlin in late July, 1972. Devlin immediately realized that the Audubon Society's charges were a newsworthy development in the already acrimonious DDT debate, and he accordingly telephoned Arbib to obtain the names of those the Society considered "paid liars".

Arbib was initially reluctant to identify any individuals as the people referred to in his article. But, as a result of Devlin's persistent urging that many eminent persons associated with the pesticide industry might be hurt unnecessarily by the Society's indiscriminate attack, Arbib eventually promised to furnish the names of specific individuals whom he felt were justly subject to the Society's charges.

Arbib, of course, did not know of anyone in particular whom he could with assurance call a "paid liar". He turned, therefore, to Roland Clement, the Audubon Society's Staff Biologist and Vice-President, who more than any other official of the naturalist organization had embroiled himself in the DDT controversy and had knowledge of its participants. Arbib testified that Clement strongly emphasized he could not call anyone specifically a paid liar. He could, however, identify those who had most persistently misused Bird Count data, despite the Society's efforts to point out their error. Clement told Arbib he had just completed an article for an environmentalist journal which listed the scientists whose distortion of the Audubon statistics seemed most egregious,[3] and, in Arbib's words,

> he believed it would be all right to give the names to Mr. Devlin as long as we qualified this by saying 'We don't have any knowledge of anyone being paid liars, and all we want to say is that they have been consistent misinterpretors of the information in *American Birds.*'

When Devlin telephoned again for the names, Arbib was prepared with Clement's article. But, Devlin and Arbib sharply disagreed at trial regarding the ensuing con-

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3 Clement, *The Pesticides Controversy*, 2 Env. Aff. 445 (1972).

versation. Arbib insisted that he conveyed, in essence, Clement's warning that the scientists discussed in Clement's article were not necessarily "paid liars". Devlin flatly denies that Arbib so cautioned him. He testified that Arbib made it clear that the scientists whose names were furnished to the *Times* were the persons referred to in Arbib's "Foreword" to *American Birds*. The list included the names of the appellees—Dr. J. Gordon Edwards, Professor of Entomology at San Jose State College in California, Dr. Thomas M. Jukes, Professor of Medical Physics and Lecturer in Nutrition at the University of California, Berkeley, and Dr. Robert H. White-Stevens, Professor of Biology at The Rutgers University in New Jersey—as well as Nobel Laureate Norman Borlaug and Dr. Donald Spencer, a lecturer of the National Agricultural Chemical Association. All of the accused were eminent scientists, though none were ornithologists.

Upon receiving these names from Arbib, Devlin attempted to secure comments from each of the five accused. He succeeded in reaching three: Dr. White-Stevens, Dr. Jukes, and Dr. Spencer. All of these scientists categorically denied the charges, and Dr. Spencer even referred to them as "almost libelous". Dr. White-Stevens and Dr. Jukes, in addition, sent Devlin voluminous supporting materials setting forth their side of the DDT debate. None of this material, however, responded directly to the Audubon Society's criticism of the use of Bird Count data by these scholars; it dealt almost entirely with the general merits of the pesticide controversy.

Having thus in good faith elicited both sides of the story to the best of his ability, Devlin wrote the article which is the sole ground for the libel judgment against the *Times* and the principal basis for the judgment against Clement. Devlin's story was published in the *Times* on August 14, 1972.

Pesticide Spokesmen Accused Of 'Lying' on Higher Bird Count

By John Devlin

"Segments of the pesticide industry and certain 'scientist-spokesmen,'" are accused in the current issue of American Birds of "lying" by saying that bird life in America is thriving despite the use of DDT.

The publication is sponsored by the National Audubon Society in collaboration with the United States Fish and Wildlife Service. The delayed current issue is devoted principally to results of the 72d Christmas Bird Count.

The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib Jr., editor.

He wrote that the reason the Christmas Bird Count showed more birds, as cited by the pesticide industry spokesmen, was not that there were more birds these days but simply "more birders" who go out on the annual counts and thus increase the size of the totals reported.

Accused Men Named

The persons under attack were not identified in the publication.

However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California; Norman E. Borlaug, Nobel Prize winner; Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and

Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who's now a private consultant and a member of the National Audubon Society.

Not all of the men could be reached for comment but those who could ridiculed the accusations as "emotional," "hysterical," and unfounded, and Dr. Spencer said they were "almost libelous."

"We are well aware," Mr. Arbib wrote, "that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals and other data in American Birds as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydro-carbon pesticides.

'Serious Declines' Found

"This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fisheaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this."

He said that with the increased coverage of Christmas Bird Counts by the press, it was important for Christmas Count spokesmen to "reiterate what we are seeing is not more birds but more birders.

"Anytime you hear a 'scientist' say the opposite," he continued, "you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

The Clement letter. Roland Clement was astonished to read in the *Times* that the Audubon Society had called its critics "paid liars." In an internal memorandum circulated the following day, Clement wrote:

> Arbib was probably incautious in giving Devlin the names involved, something he got from me. Devlin probably asked whom do you consider liars, and Arbib was trapped into listing people I have never called liars, though they may be.

Nonetheless, Clement apparently decided that the unfortunate situation could best be turned to advantage by playing down the accusation against the appellees, Spencer, and Borlaug while reiterating and clarifying the Society's position on the merits of the Bird Count controversy. Accordingly, Clement sent the following letter to the *Times* over Arbib's signature.

> Jack Devlin's punchy piece on the Audubon Christmas Bird County summary . . . unfortunately leaves out the most important qualifications we attach to these counts.
>
> It is not simply that more birds are reported because there are more birders, but that we have more birders who are also better birders . . . .
>
> Nor do we like to call people liars, but those who have most consistently misused our data—Robert H. White-Stevens . . ., Thomas H. Jukes . . ., Donald A. Spencer . . ., J. Gordon Edwards . . ., and more recently Nobel laureate Norman E. Borlaug—certainly have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy.

Judge Metzner ruled this letter libelous per se, though it eschewed all the suggestions of venality that had appeared in the *American Birds* Foreword and *Times* article, and though it fully explained the basis for Clement's view that the scientists were in bad faith. The letter was never published by the *Times*.

Litigation. The appellees filed their complaints against the *Times* and the National Audubon Society in April, 1973; subsequently Arbib and Clement were added as defendants. After nearly three years of discovery, Judge Metzner denied the defendants' motion for summary judgment, on the sole ground that there was a disputed issue of fact: whether Arbib actually told Devlin that those whose names were being furnished to the *Times* were not the "paid liars" referred to in *American Birds*. Despite his finding that the appellees were "public figures",[4] Judge Metzner was of the view a jury might find actual malice on the part of one or another defendant, depending upon its resolution of this question of fact, even in the face of *New York Times* v. *Sullivan, supra*.

The district judge further simplified the issues by ruling that both the *New York Times* article of August 14, 1972, and Clement's rebuttal letter of the same day were defamatory *per se* because they impugned the professional integrity of the appellees. In addition, the jury was instructed that the *Times* could be found guilty of actual malice if Devlin had serious doubts about the truth of the statement that the appellees were paid liars, even if he did not have any doubt that he was reporting Arbib's allegations faithfully. The jury returned a verdict against

4 The district court's finding that the appellees were "public figures", at least within the context of the DDT controversy, is unchallenged on this appeal. It is accordingly conceded that the jury's verdict cannot be upheld unless it is based on clear and convincing evidence of "actual malice". *New York Times* v. *Sullivan, supra*.

both the *Times* and Clement, but exonerated Arbib. It awarded $20,000 damages to Dr. Jukes and Dr. White-Stevens, respectively, and $21,000 to Dr. Edwards.

The *Times* and Clement moved for judgment n.o.v. Judge Metzner interpreted the surprising verdict against *both* appellants as reflecting the jury's belief that, although Devlin had accurately reported the information received from Arbib, he had been "reckless" in failing to investigate further after the responses from White-Stevens, Jukes, and Spencer placed him on notice of the defamatory potential of his proposed article. The evidence, in his view, was sufficient to support this finding, and accordingly Judge Metzner denied the *Times'* motion. The basis for Clement's liability was the jury's implicit finding that Clement gave Arbib the appellants' names knowing the purpose for which they would be used. Judge Metzner regarded the evidence sufficient to support this conclusion.

II.

Implicit in the jury's verdict against Clement is the finding, which we must accept, that the *Times* accurately reported the five scientists whose names were furnished by Arbib were the "paid liars" referred to in the *American Birds* Foreword. We believe that a libel judgment against the *Times*, in the face of this finding of fact, is constitutionally impermissible.

At stake in this case is a fundamental principle. Succinctly stated, when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. *See Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *Medina* v. *Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971). What

is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation. *Cf. Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.

The contours of the press's right of neutral reportage are, of course, defined by the principle that gives life to it. Literal accuracy is not a prerequisite: if we are to enjoy the blessings of a robust and unintimidated press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made. *Time, Inc.* v. *Pape, supra.* It is equally clear, however, that a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage. In such instances he assumes responsibility for the underlying accusations. *See Goldwater* v. *Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

It is clear here, that Devlin reported Audubon's charges fairly and accurately. He did not in any way espouse the Society's accusations: indeed, Devlin published the maligned scientists' outraged reactions in the same article that contained the Society's attack. The *Times* article, in short, was the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps.

Accordingly, we hold that it was privileged under the First Amendment.

III.

Even absent the special protection afforded to neutral reportage, *see Time, Inc.* v. *Pape, supra*, the evidence adduced at trial was manifestly insufficient to demonstrate "actual malice" on the part of the *Times*. It is uncontested that Devlin was unaware of the baselessness of the Audubon Society's dramatic allegations. Nor was there a shred of evidence from which the jury might have found that Devlin entertained serious doubts concerning the truth of Arbib's charge that the appellees were "paid liars."

It is conceded that the *Times* might have published the Audubon Society's accusations without fear of liability had Devlin but refrained from eliciting the views of the Society's victims. The appellees would punish the *Times* for its effort to confirm the story, apparently maintaining that a little prudence is a dangerous thing. They assert that once Devlin heard the scientists' denials and received materials explaining their general stand in the DDT controversy, he became charged with the duty to publish absolutely nothing until he conducted a full-scale investigation plumbing to the bottom of the matter.

We do not believe, however, that the scientists' responses to Devlin's inquiries could be found sufficient to warn Devlin of the probable falsity of the Society's charges. Surely liability under the "clear and convincing proof" standard of *New York Times* v. *Sullivan* cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error. Nor, in our view, did the availability of a mass of materials, largely irrelevant to the Bird Count controversy, and completely

irrelevant to the assertedly libelous accusations of the Audubon Society, provide any basis for a finding that Devlin knew the charges were probably false. Accordingly, even if the *Times* were required to assume direct responsibility for the accusations, it could not, consistent with *New York Times* v. *Sullivan, supra,* be found liable for defamation.[5]

IV.

We conclude also that the evidence was insufficient to support the jury's verdict against Roland Clement.

It is helpful in analyzing Mr. Clement's asserted liability to understand precisely what aspect of the Audubon Society's charges constituted a libelous assault on the character of the appellees. It is plain that the letter Clement sent to the *Times* August 14, 1972, was not defamatory.

5 The *Times* vigorously argues that Judge Metzner erred in ruling Devlin's article to be libel *per se*. The *Times* carefully notes that an allegedly libelous statement must be evaluated in the light of First Amendment mandates and with full regard to the context of the assertedly defamatory utterance. *Buckley* v. *Littell,* 539 F.2d 882 (2d Cir. 1976), *cert. denied,* 45 U.S.L.W. 3439 (January 17, 1977). Since the scientific community, whose opinion of the appellees is of special concern, would be accustomed to extravagant charges in connection with the DDT debate, the *Times* urges that it would not have regarded the Audubon Society's allegations as defamatory. At the very least, the *Times* suggests, the evidence offered to show that the heart of the DDT controversy should have been admitted and the issue of whether the statements were defamatory left to the jury.

Under the particular circumstances presented in this case, we do not find any error in the ruling of the district court. Devlin's article does not even arguably present the difficult problem of carefully parsing statements to see if they are expressions of opinion rather than fact. Contrast *Buckley* v. *Littell, supra* at 892-895. As we explain below, to call the appellees, all of whom were university professors, *paid* liars clearly involves defamation that far exceeds the bounds of the prior controversy. No allegation could be better calculated to ruin an academic reputation. And, to say a scientist is *paid* to lie implies corruption, and not merely a poor opinion of his scientific integrity. Such a statement requires a factual basis, and no one contends there was any serious basis for such a statement in this case.

The critical language of that communication was as follows:

> Nor do we like to call people liars, but those who have most consistently misused our data [including the appellees] certainly have had time to learn from our patient explanations. . . .

Absent from this passage is the critical allegation that the appellees were *paid* liars. The epithet "liar" in this context, standing by itself, merely expressed the *opinion* that anyone who persisted in misusing Audubon statistics after being forewarned could not be intellectually honest. Since the basis for this opinion was fully set forth, the communication of Clement's views cannot be libelous, however mistaken they might be. *Hotchner* v. *Castillo-Puche,* Slip Op. 2521 (2d Cir. 1977).

Unfortunately, the Audubon Society's principal charges, as reported in Devlin's article for the *Times,* went far beyond a mere accusation of scientific bad faith. The appellees were charged with being "paid to lie". It is difficult to conceive of any epithet better calculated to subject a scholar to the scorn and ridicule of his colleagues than "paid liar." It is this completely foundationless accusation of venality that constitutes the essence of the calumny against the appellees.

Because of the unusual circumstances presented here, however, it is difficult to assign responsibility for the false denunciation of the appellees as paid liars. Arbib, of course, was exonerated by the jury. But, there is scarcely a wisp of evidence in the record from which it could be inferred that Arbib's associate at the Audubon Society, Clement, supplied Arbib with the appellees' names, *knowing* they would be portrayed as paid liars. Indeed, Arbib's testimony was completely uncontradicted, that Clement

provided the names of prominent spokesmen on behalf of DDT only on condition that Devlin be told "we are not calling anyone paid liars." Of course, the jury evidently found that Arbib failed to warn Devlin that he was not calling the appellees paid liars, though he did caution against naming them in a *Times* article. But this failure can hardly be attributed to Clement, who on the morrow of the *Times* article confidently expressed his belief that Arbib had been "trapped" into identifying the appellees as those referred to as paid liars in the *American Birds* Foreword.

In the absence of any direct evidence that Clement gave Arbib the names of prominent DDT defenders, knowing they would be pilloried as paid liars in the *New York Times,* the appellees vigorously urge that Clement's letter of August 14 in effect ratified the charges. But, although by this missive Clement demonstrated himself quite content to have called the appellees liars, he never intimated that the appellees were corrupt. Since this accusation of venality alone was defamatory, Clement's letter to the editor—never published—simply does not tend to establish its author's responsibility for the libelous statement appearing in Devlin's article.[6]

V.

We do not underestimate the pain and distress which the publication of the Audubon Society's thoughtless

6 At trial the appellees called Victor Yannacone, Jr., who testified that Clement was present, some years earlier, at meetings of the Environmental Defense Fund where "smearing" proponents of DDT in the press was discussed. This testimony was contradicted by Dr. Charles Wurzer, another alleged participant in these meetings, and there was no evidence that any "smearings" actually occurred. We believe the vague and dated testimony of Yannacone does not, in any way, support the inference that Clement ever accused the appellees falsely of corruption.

charges has caused the appellees. And we are fully aware that, in Professor Emerson's words,[7]

> A member of a civilized society should have some measure of protection against unwarranted attack upon his honor, his dignity and his standing in the community.

Our holding today does not in any way condone the mischievous and unwarranted assault on the good name of the appellees, who appear from their writings to have entered the lists in favor of DDT in good faith and from humanitarian motives that ought to be beyond reproach.

Nevertheless, we believe that the interest of a public figure in the purity of his reputation cannot be allowed to obstruct that vital pulse of ideas and intelligence on which an informed and self-governing people depend. It is unfortunate that the exercise of liberties so precious as freedom of speech and of the press may sometimes do harm that the state is powerless to recompense: but this is the price that must be paid for the blessings of a democratic way of life.

We believe that the *New York Times* cannot, consistently with the First Amendment, be afflicted with a libel judgment for the accurate reporting of newsworthy accusations made by a responsible and well-noted organization like the National Audubon Society. And, we are convinced that Roland Clement cannot be found liable for a defamatory statement which, as far as this record reveals, he never made. Accordingly, we reverse the judgments against the *Times* and Clement and dismiss the appellees' complaint.

7 T. Emerson, *Toward a General Theory of the First Amendment* 69 (Vintage 1967).

APPENDIX B

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1727 (CMM)

No. 45425

J. GORDON EDWARDS, Ph.D.
THOMAS M. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,

Plaintiffs,

—against—

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
ROBERT S. ARBIB, JR., ROLAND C. CLEMENT,
ELVIN J. STAHR, JR.,

Defendants.

METZNER, D.J.:

Defendant Roland C. Clement moves for judgment notwithstanding the verdict rendered by the jury in favor of the plaintiffs in this action. Fed. R. Civ. P. 50(b).

This is a libel action in which the jury awarded compensatory damages, but denied punitive damages, in favor of each of the plaintiffs against the New York Times and defendant Clement, a vice president of the National Audubon Society, Inc. (the Society). The jury also rendered a verdict in favor of defendants Robert S. Arbib, Jr. and the Society.

The standard of liability set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), permits recovery only if the

plaintiff proves "that the statement was made with 'actual malice,—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." A great deal of the background of this lawsuit has been set forth in the companion motion brought by the New York Times Company and need not be repeated here.

On this motion the court must view the evidence in the light most favorable to the plaintiffs. *O'Connor v. Pennsylvania R.R.*, 308 F.2d 911, 914 (2d Cir. 1962).

Arbib was asked by Devlin for the names of the scientists to whom he was referring as paid liars in the foreword to the April 1972 issue of American Birds. American Birds is a magazine published by the Society. Arbib told Clement about Devlin's request and Clement was the person who furnished the names. Clement is an officer of the Society with the title of Vice President for Biology, "which means that I had overview of the scientific validity of Audubon Society positions."

Clement knew the purpose for which those names would be used in the Times story. He deliberately called those plaintiffs liars. Clement read the story in this Times on the morning of publication and sent a letter over Arbib's name to the New York Times. This letter referred to "Jack Devlin's punchy piece," and went on to say, "[n]or do we like to call people liars, but" those who have misused the bird count data have had the opportunity to learn of their misinterpretations from the Society's explanations. Clement testified that the import of this letter was to rebut the statement that the five named persons were being called liars. He testified that the language in the letter meant that "we are not calling people liars." Despite Clement's testimony, the jury was entitled to draw the inference from the letter that Clement did intend to call the five liars.

No amount of honest controversy regarding the use of the bird count in the D.D.T. controversy can justify this action. There just was no basis for calling the plaintiffs paid liars.

Finally, the jury observed Clement on the witness stand. His demeanor and attitude added to the background of the facts which the jury was justified in finding from the evidence. For example, he flatly denied that anyone was being called a liar in the Foreword. The evidence amply supports the verdict of the jury of actual malice as defined in the *Sullivan* case *supra*.

Motion denied.

So ordered.

Dated: New York, N.Y.
December 9, 1976

CHARLES M. METZNER
U.S.D.J.

APPENDIX C

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1727 (CMM)

No. 45411

J. GORDON EDWARDS, Ph.D.,
THOMAS M. JUKES, ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,
Plaintiffs,

—against—

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC.,
ROBERT S. ARBIB, JR., ROLAND C. CLEMENTS,
ELVIN J. STAHR, JR.,
Defendants.

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Of Counsel

METZNER, D.J.:

Defendant The New York Times Company (the Times) moves for judgment notwithstanding the verdict rendered by the jury in favor of the plaintiffs in this action. Fed. R. Civ. P. Rule 50(b).

This is a libel action in which the jury awarded compensatory damages, but denied punitive damages, in favor of each of the plaintiffs against the Times and defendant Roland Clement, a vice president of the National Audubon Society, Inc. (the Society). The jury also rendered a verdict in favor of defendants Robert S. Arbib, Jr. and the Society.

The basis for the motion is that the standard of liability created in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), has not been met by the evidence produced by these plaintiffs. That standard permits recovery only if the plaintiff proves "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The background of this lawsuit starts with the appearance of the Foreword to the April 1972 issue of "American Birds," a magazine published by the Society. Despite its date, the magazine was not distributed until the first week of July, 1972. Sometime around the end of July or the beginning of August, John Devlin, Sr., a reporter for the Times who has specialized in nature stories, read the issue and his attention was caught by statements made in the Foreword directed to the use of the Christmas bird count in connection with the DDT controversy that was raging in those days. The Foreword stated that it was "well aware that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals... as proving that the bird life in North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides." The Foreword went on to

state that: "This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons."

After stating what is supposed to be the truth regarding the bird count and its implications, this portion of the Foreword concludes:

> "Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

On August 14, 1972, a two-column story appeared in the Times under a Devlin byline. The headline over the story read, "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." According to the article, the accuser was Arbib, the editor of "American Birds." The story goes on to state that while the Foreword did not identify the alleged spokesmen accused of lying, Arbib furnished the reporter with the names of five persons intended to be covered by the accusation, three of whom are plaintiffs in this case. The Times story gave the five names with identifying information as to each. The three plaintiffs in this lawsuit are Dr. Robert H. White-Stevens, a professor of biology and chairman of the Bureau of Conservation at Rutgers University, Dr. Thomas H. Jukes, a professor of biochemistry at the University of California at Berkeley, and Dr. J. Gordon Edwards, a professor of entomology at San Jose State College. The other two persons named in the story were Dr. Norman E. Borlaug, a Nobel Prize winner, and Dr. Donald A. Spencer, a retired ecologist and now a private consultant.

The Times story relates that not all those named could be reached for comment, but that those who were reached ridiculed the accusations as "emotional" and "hysterical," with Dr. Spencer being quoted as saying they were "almost libelous." The story concludes with quotations from the Foreword, including those referred to above, as well as paraphrasing of other protions.

The case was submitted to the jury without objection on the assumption that the plaintiffs were public figures. The story is clearly libelous. *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976).

There is no doubt that the Times story accurately reported and correctly quoted from the Foreword in American Birds, although the headline was slightly off in accuracy. The jury found on credible evidence that the Times accurately reported the five names furnished by Arbib as being those referred to as liars in the Foreword.

The Times' position is that under these facts, the jury was not presented with clear and convincing proof that the article was published with actual malice and therefore could not have returned a verdict in favor of the plaintiffs. If this were all there is to the case, the court might be of a mind to grant defendant's motion. In fact, it might well have disposed of the litigation by granting the usual motion made at the end of the plaintiffs' case or at the end of the entire case. However, the events that transpired between the time Devlin read the Foreword and the publication of his story on August 14, 1972, require a denial of the motion.

In considering a motion for judgment notwithstanding the verdict, the court shall view the evidence in the light most favorable to the plaintiffs. *O'Connor v. Pennsylvania R.R.*, 308 F.2d 911, 914 (2d Cir. 1962).

We have here a reporter of 25 years' experience who must have known from the outset that he was dealing with a libelous article. The Times has never contended that the story was not libelous. The reporter attended annual meetings of the Society, went on field trips, and had written several articles for the Society. He was not a novice as to the background of the story. Finally, his memory on the witness stand as to the events leading up to the publication of the story was abysmally poor and contadictory. He could not remember with any degree of accuracy to whom he spoke or the extent of the conversations.

The jury was fully justified in finding that while Arbib had furnished Devlin with the names, he had also cautioned against their use. This does not necessarily include a finding that Arbib had stated to Devlin that he was not calling the five persons liars.

Devlin pressured Arbib for the names because he was of the opinion that this was newsworthy—the public ought to know which scientists were being called liars by the Society.

Devlin, with the names in hand, contacted Dr. White-Stevens on August 4 and read the Foreword to him. They had a 45-minute telephone conversation which covered the whole range of the agricultural chemical business. The testimony shows that this plaintiff was an outstanding scholar in the field of biology. Devlin was told that the statements were slanderous and scurrilous and should be checked carefully before being used. Dr. White-Stevens furnished Devlin with the telephone numbers of the other four named by Arbib although Devlin already knew that Dr. Borlaug was a Nobel Prize winner and associated with Rockefeller University, a most prestigious research institution here in New York City. This plaintiff also furnished Devlin with the telephone numbers of other eminent scientists in the field of pest control who should be contacted for their views on the subject. Devlin offered Dr. White-Stevens the opportunity to publish a story on the Op-Ed page of the Times, or even write an article for the Sunday Magazine section, but this offer was never followed up by Devlin.

Finally, Dr. White-Stevens recapitulated this conversation in a letter to Devlin on August 8 in which he furnished a list of materials for Devlin to read.

Devlin next called Dr. Jukes on August 7. The testimony of Dr. Jukes showed that he is an eminent scientist in the area of biochemistry and regarded as an international authority on poultry nutrition. He organized the first chapter of the Sierra Club outside the state of California. Devlin told Dr. Jukes that he was working on an article predicated on information given to him by the Society to the effect that Dr. Jukes was a paid liar on behalf of the chemical industry. Dr. Jukes explained to Devlin his method of evaluating bird counts and referred to a letter written by the president of the Hawk Mountain Association. This plaintiff also told Devlin he was not a liar. The telephone conversation was followed up by Dr. Jukes in a letter sent to Devlin the same day.

Devlin also spoke on the telephone to Dr. Spencer who was not a party to this action, nor did he testify as a witness. However, Devlin's notes show that he wrote "WOW" next to the notation that Spencer called the statements in the Foreword libelous. Devlin testified on trial, "These are newsmaking names. The charges are very dramatic and newsy."

We thus have an initial publication which was not actionable in the absence of names. The reporter pushes for disclosure of the names so that he might write a story, in a newspaper with over 900,000 daily circulation, about individuals who have been called liars in one of the Society's publications. He knows from the inception that one of the scientists being called a liar is a Nobel Prize winner. He finds out as early as ten days before publication that at least two of the plaintiffs are not in the employ of the pesticide industry, nor are they being paid by such manufacturers to lie. He is given extensive background material on the views of these persons. He is furnished with names of other scientists with whom he might check out the story. He never made any effort to consult with counsel for the Times as to possible liability if the story were published. There is no evidence that any of his superiors made such inquiry.

Ten days were devoted to putting this story in shape with three different drafts of summaries sent by Devlin to his superiors for approval. Despite the warnings and the information furnished the reporter, the story appears in the newspaper as though it had been written the day after the Foreword first appeared in print and no investigation had ever been made. Dr. White-Stevens testified that after a week, he stopped reading the Times for any story as to the Foreword. He assumed that Devlin had checked out what he had told Devlin and that Devlin was satisfied that the story was not warranted. Great was this plaintiff's surprise when a student brought the story to his attention. He read it and found that Devlin had ignored everything he told him in the lengthy telephone conversation and in his letter to Devlin.

It cannot be said that the Times knew that the statements in the story were false. However, the jury was justified in finding

clear and convincing proof from the evidence and the inferences to be drawn therefrom that the story of August 14 was published with reckless disregard of whether it was false or not. This satisfies the test of malice as defined in the *Sullivan* case, *supra.*

This evidence also satisfied the test in *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968), to the effect that:

> "[R]eckless conduct is not measured by whether a reasonable prudent man would have published, or would have investigated before publishing. There must be sufficient evidence t permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

I am aware of the words in the sentence following the above quotation, which states that such a test "permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." I cannot take these words to mean that the reporter's testimony is not subject to impeachment by the accepted use of cross-examination and contradictory direct testimony.

Motion denied.

So ordered.

Dated: New York, N.Y.
December 1, 1976

/s/ CHARLES M. METZNER
U.S.D.J.

APPENDIX D

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ.1727 (CMM)

No. 43779

J. GORDON EDWARDS, Ph.D., et al.,

Plaintiffs,

—against—

NATIONAL AUDUBON SOCIETY, INC.,
THE NEW YORK TIMES COMPANY, INC., et al.,

Defendants.

METZNER, D.J.:

Defendants move for summary judgment in this defamation action based upon an article in "American Birds," a subsequent report on that article in the New York Times on August 14, 1972, and a letter from one defendant to the New York Times dated August 14, 1972.

The April,1972 issue of "American Birds," a quarterly publication of the National Audubon Society, reported the results of the annual Audubon Christmas Bird Count. In the foreword of that issue its editor, defendant Robert Arbib, wrote that "certain paid 'scientist-spokesmen'" of the pesticide industry were citing the Christmas Bird Count totals to prove that North American bird life was thriving despite the use of DDT. He called this conclusion "false and misleading," stating that the higher counts were results of more and better bird counters and not more birds. Arbib further stated that "[a]ny time you hear a

'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about." The April, 1972 issue of "American Birds" was not mailed out until July.

On August 14, 1972, the New York Times carried an article about the foreword to "American Birds" bearing the headline "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count.'" The New York Times named five scientists who had been cited by Arbib in an interview with John Devlin, the New York Times reporter. Three of these scientists are the plaintiffs in this action.

On August 24, 1972, defendant Roland Clement sent a letter over the signature of defendant Arbib to the New York Times. This letter referred to "Jack Devlin's punch piece." Clement wrote "[n]or do we like to call people liars, but" those who have misused the Audubon data have had the opportunity to learn of their misinterpretation from the Society's explanations. The five scientists were named in this letter. The New York Times did not print the letter.

Defendants contend that plaintiffs are public figures in the context of this action because of their reputations in the scientific community and their public stands on the controversy surrounding the use of DDT. As public figures under the standard laid down in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and in *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967), plaintiffs must prove actual malice on the part of defendants in order to succeed in this action.

Plaintiffs deny that they are public figures, contending that the controversy surrounds the use of the Audubon Christmas Bird Count data, not a matter of general public interest.

The controversy surrounding the use of DDT is of interest to the public. Plainitffs are prominent scientists who have written and lectured on various subjects, including the use of pesticides.

They are public figures in the context of this action. *Guitzx v. Westinghouse Electric Corporation,* 396 F. Supp. 1042 (S.D.N.Y. 1975) *Adey v. United Action for Animals, Inc.* 361 F. Supp. 457 (S.D.N.Y. 1973), *aff'd nom.*, 493 F.2d 1977 (2d Cir.), *cert. denied,* 419 U.S. 042 (1974).

The burden is on the movants to show the absence of any genuine issue as to whether they acted with actual malice when they made the statements. A statement is made with actual malice if it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan, supra* at 280

The Court has reviewed the depositions of the parties and of perspective witnesses which plaintiffs have submitted in opposition to this motion. Defendant Arbib testified that he wrote the article in "American Birds" with no specific individuals in mind, upon a suggestion by defendant Clement or another that the magazine say something about misuse of the Christmas Bird Count data. He testified that John Devlin pressured him for the names of the scientists to whom he was referring for use in the New York Times report on the article. Upon consultation with Clement, Arbib gave Devlin the names of five scientists cited by Clement. Both Arbib and Clement testified that they supplied the names of the scientists as misusers of data and not as liars. Arbib said that he told Devlin that he did not want the men to be called liars.

Devlin testified that Arbib said that it would be better not to use names, but that the five scientists he did name were the persons to whom the article referred. Devlin denied that Arbib said that these men were not to be called liars. In addition, there is the August 14, 1972 letter to the New York Times written by Clement, over the signature of Arbib, from which a jury might infer approval of the New York Times article.

Devlin testified that he called some of the scientists before publication. Their testimony is that they protested the charge as

untrue and sent letters and information about the DDT controversy to Devlin. One labeled the charge as libelous. Whether there was adequate investigation of a story that was not "hot news" is a question of fact for a jury. A finding that the investigation was inadequate would permit an inference of actual malice. *Curtis Publishing Company v. Butts, supra* at 156-158.

There are also allegations of the animosity of Clement and the National Audubon Society to those who oppose their position on the DDT controversy. Those are supported by the deposition testimony of Victor Yarnacona, an attorney who has worked with Clement and the National Audubon Society on environmental matters. He testified about discussions at the Environmental Defense Fund, with Clement and other associates of the National Audubon Society participating. These discussions centered around methods to silence or discredit opponents of their stand on DDT. He said that one plaintiff was "a constant subject of discussion" and another was "an occasional subject of discussion." This testimony would go to the question of the intent of defendants.

In sum there are questions of fact raised here about the state of mind and good faith of the defendants in publishing a charge that plaintiffs were lying. Viewing the evidence submitted and the inferences which might be drawn from it "in the light most favorable to the party opposing the motion," *United States v. Diehold, Inc.*, 369 U.S. 654, 655 (1962), questions of fact exist as to whether any or all defendants acted with actual malice.

The motion is denied.

So ordered.

Dated: New York, N.Y.
January 23, 1976

CHARLES M. METZNER
U.S.D.J.

Supreme Court, U. S.
FILED
NOV 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-576

J. GORDON EDWARDS, PH.D., THOMAS H. JUKES, PH.D., ROBERT WHITE-STEVENS, PH.D.,
Petitioners,

v.

NATIONAL AUDUBON SOCIETY, INC., ROBERT S. ARBIB, JR., ELVIS J. STAHR, JR.,
Defendants,

and

THE NEW YORK TIMES COMPANY, ROLAND C. CLEMENT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-576.

J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D., ROBERT WHITE-STEVENS, Ph.D.,

Petitioners,

v.

NATIONAL AUDUBON SOCIETY, Inc., ROBERT S. ARBIB, Jr., ELVIS J. STAHR, Jr.,

Defendants,

and

THE NEW YORK TIMES COMPANY, ROLAND C. CLEMENT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Questions Presented for Review.

Question No. 1, posed at page 2 of the petition, is not presented by this record.

The record does not support a finding of reckless disregard for the truth on the part of either the New York Times or Roland C. Clement. Consequently, there is no issue in this respect for submission to this Court.

Question No. 2 is incorrect in asserting the decision of the Court of Appeals affords an unprecedented and near absolute immunity to the press.

The Court of Appeals decision has not afforded an unprecedented or near absolute immunity to anyone.

The decision of the Court of Appeals on this record does not constitute any departure from or extension of the First Amendment protection afforded the press, and is entirely consonant with prior decisions of this Court. Furthermore, the Court below found that "Roland Clement cannot be found liable for a defamatory statement, which, as far as this record reveals, he never made" (petition, 19A).

Question No. 3 incorrectly characterizes the review of the evidence by the Court of Appeals. We submit the weight of evidence is not an appropriate subject for this Court's review.

Question No. 4 is not presented on the record before this Court.

The Court of Appeals set aside the verdicts and dismissed the complaint also because the evidence did not support a finding of actual malice against either respondent, and failed to support a finding that respondent, Clement, uttered a libel.

Accordingly, there is nothing presented which warrants review by this Court.

ARGUMENT.

I.

The Court of Appeals did not eliminate reckless disregard as a basis for a finding of actual malice in public figure libel cases. No such disregard can be found to exist on the record of this case, and review by this Court based upon petitioners' contentions to the contrary is unwarranted. The Court of Appeals did not depart from the legal rationale of *New York Times v. Sullivan,* 376 U. S. 254 (1964), or any of the opinions sired by that decision.

The fact that Devlin was aware of the position of petitioners is not a basis for a finding of actual malice. As this Court has made it clear, mere denials of allegations are insufficient to establish the "high degree of awareness of • • • probable falsity" that is required to find actual malice through reckless disregard for the truth. *Garrison v. Louisiana,* 379 U. S. 64, 74 (1964).

Investigatory failures, without more, likewise fail to qualify as a basis for finding actual malice through reckless disregard of the truth. *Curtis Publishing Co. v. Butts,* 388 U. S. 130, 153-54 (175).

The Times had inquired of both sides in the controversy and knew there were sharply divergent views. Publication at that point without further investigation, particularly where, as here, both sides of the issue are reported, is not reckless disregard.

As stated in *St. Amant v. Thompson,* 390 U. S. 727, 731 (1968):

> "[The] cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

Implicit in the Court of Appeals finding that the Times article "was the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps" (556 F. 2d at 120, appendix to petition at 14A) is the finding that the publication was not made in reckless disregard for the truth. Nothing in its opinion, or the record of this case, constitutes, or makes possible, the radical departure from *Times v. Sullivan*, urged by petitioners in their Point I.

II.

There is nothing novel, special or uniquely important about the constitutional issues presented in this routine libel case. An individual certainly does have a right to protection of his own good name (petition, at 15), and it is equally certain that that right is limited by "the need for a vigorous and uninhibited press • • •." *Gertz v. Welsh*, 418 U. S. 323, 342 (1974). This Court has provided abundant guidance to the lower courts as to the considerations relevant to the reconciliation of these conflicting policies, e. g., *Ocala Star-Banner Co. v. Damson*, 401 U. S. 295, 300-01 (1971); *Time, Inc., v. Pape*, 401 U. S. 279, 290-92 (1971); *St. Amant v. Thompson, supra.*

Absent significant issues of law, not previously adjudicated, undertaking a case-by-case factual balancing between the needs of the press and its readers and an individual's claim to compensation for injurious falsehood,

as by granting the petition herein, would render this Court's duty to supervise the lower courts unmanageable. The standard for recovery by a public figure for injury to reputation has been announced. See *Gertz*, 418 U. S. at 342-43. Each nuance of its application in individual cases is not, we submit, an appropriate matter for review by this Court. The issues presented on this record are narrow and principally of interest to these litigants.

Petitioners would invert the public interest in robust and open debate on controversial issues, and misuse it to stifle the Times reporting of views held by those opposed to theirs. The Times and the public have the right to report and know the position of the parties to a rough and tumble public controversy.

Petitioners have described the Audubon Society as "deliberately genocidal" and guilty of '*de facto* murder." They will not be deterred by the Times article they complain of here, and their First Amendment rights have never been an issue in this case, in any event.

III.

Petitioners attack the exercise by the Court of Appeals of its function in reviewing and evaluating the legal effect of testimony and other evidence adduced at the trial. Such factual assertions should not, we submit, burden this Court.

Furthermore, it is petitioners who have been afield in their examination of the evidence rather than the Court of Appeals.

Thus, they assert that the Court of Appeals did not take note of "Clement's contempt for and hostility towards petitioner throughout the proceedings" (petition at 23).

However, it is beyond doubt that the clear and convincing proof of "actual malice" required by the *Sullivan* test is not satisfied by proof of general ill will or hatred. *Greenbelt Cooperative Publishing Association v. Bresler,* 398 U. S. 6, 10-11 (1970); *Garrison v. Louisiana,* 379 U. S. 64, 73-75 (1964).

The petition additionally asserts that Clement supplied the petitioners' names "to Arbib without a word of caution" (petition at 24). This is directly contradicted by the record.

> "Indeed, Arbib's testimony was completely contradicted, that Clement provided the names of prominent spokesmen on behalf of DDT only on condition that Devlin be told 'we are not calling anyone paid liars'" (petition at 17A-18A).
>
> "he [Clement] believed it would be all right to give the names to Mr. Devlin as long as we qualified this by saying 'We don't have any knowledge of anyone being paid liars, and all we want to say is that they have been consistent misinterpretors of the information in *American Birds*'" (petition at 7A quoting the trial transcript at 549).

A further factual confusion manifested in the petition is demonstrated by the reference (petition at 14) on the question of malice to the opinion below dealing with the absence of evidence of Clement's supplying the petitioners' names knowing they would be portrayed as "paid liars." Petitioners fail to recognize the distinction between the utterance of a libel and the element of actual malice, which may motivate such an utterance. The Court of Appeals found an "absence of any evidence in the record that he [Clement] endorsed or made the single statement that could be found to have been libelous under the Constitution" (petition, p. 3A). This had nothing to do with malice.

None of Mr. Clement's language, except for the softening phrase he added to the *American Birds* Foreword: "or is parroting something he knows little about" after the phrase "paid to lie," was published in the August 14, 1972 New York Times article. In any event, the Foreword, which the District Court found to be non-libelous, did not identify any persons.

A third party cannot be charged with a libel by a publication unless there was either a *verbatim* or substantially accurate repetition of defamatory material he uttered. *Klein v. Biben,* 296 N. Y. 638 (1946); *MacFadden v. Anthony,* 107 N. Y. S. 2d 520 (N. Y. Co. 1952); *Storch v. Gordon,* 23 Misc. 2d 477, 481 (Kings Co. 1960). Clement conveyed petitioners' names to Arbib solely by means of a non-defamatory manuscript, which was placed in evidence, with the admonition "that we are not calling anyone paid liars."

A search of the applicable authorities in New York and elsewhere in the United States, expectably, discloses no decision which upholds a charge of libel against a person who made non-defamatory utterances out of the presence of the press, where those utterances were subsequently called to the attention of the press, and did not appear either in substance or verbatim in the newspaper article held to be libelous. Such is the unprecedented result petitioners seek as to respondent, Clement.

The evidence did not support a finding of either a libel or actual malice against Clement, and the Court of Appeals did not exceed the proper bounds of appellate review of the evidence in so holding.

There was no impropriety by the Court of Appeals below; its decision was consonant in all respects with the

rule of law articulated by this Court, and no special and important reasons for review or a writ of certiorari are presented.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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MORRIS ZWEIBEL,
Of Counsel.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 77-576

J. GORDON EDWARDS, PH.D., THOMAS H. JUKES, PH.D., ROBERT H. WHITE-STEVENS, PH.D.,

Petitioners,

v.

THE NEW YORK TIMES COMPANY and ROLAND C. CLEMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT THE NEW YORK TIMES COMPANY IN OPPOSITION

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In the

Supreme Court of the United States

No. 77-576

J. Gordon Edwards, Ph.D., Thomas H. Jukes, Ph.D., Robert H. White-Stevens, Ph.D.,

Petitioners,

v.

The New York Times Company and Roland C. Clement,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT THE NEW YORK TIMES COMPANY IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (App. A of Petition) is reported at 556 F.2d 113. The opinion of the District Court (App. C of Petition) denying the motion for judgment *n.o.v.* of defendant The New York Times Company (the "*Times*") is reported at 423 F. Supp. 516. The opinion of the District Court (App. B of Petition) denying the motion of defendant Roland C. Clement for judgment *n.o.v.* is unreported. The opinion of the District Court denying motions by the *Times,* Clement and certain other defendants for summary judgment after reargument of a prior order denying summary judgment is reported at 411 F.Supp. 744 and not appended to the Petition.*

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* The Petition (p. 2) inaccurately states that the opinion reported at 411 F.Supp. 744 is reproduced as Appendix D.

Jurisdiction

Petitioners assert jurisdiction of this Court arises under 28 U.S.C. § 1254(1) (1970).

Question Presented

Whether the United States Court of Appeals for the Second Circuit correctly held that a libel judgment against the *Times* for accurately reporting charges made by the National Audubon Society against public figure plaintiffs was impermissible under the First Amendment to the United States Constitution, and, in any event, unsupported by the clear and convincing proof needed to sustain a jury verdict of actual malice.

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

> State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

This case arises out of the accurate reporting by the *Times* of accusations made by officials of the National Audubon Society, Inc. ("Audubon") against five scientists, three of whom commenced this action. The accusations were made in the midst of the heated national debate over the use of DDT and its possible effect on bird life in which the plaintiffs and Audubon were—and are—opponents.* In the context of that debate, Audubon accused the plaintiffs of being, in effect, paid liars, an accusation reported by the *Times*, together with denials by those accused.

With a single excepton, the facts of this action as they relate to the *Times* have essentially been undisputed from the outset. In late July or early August, 1972, the Foreword to the April 1972 issue of Audubon's quarterly publication, *American Birds*, came to the attention of John Devlin, Sr., a *Times* reporter who had often written on nature subjects. The Foreword denounced the use being made of Audubon's bird count data by some proponents

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* Audubon actively supported a ban on the use of DDT which was ordered by the Environmental Protection Agency two months before the publication of the *Times* article at issue in this litigation. The plaintiffs vigorously opposed the ban and organizations that advocated it. As the Court of Appeals noted, at times the DDT controversy in which "fundamental questions of value" were at stake, "exceeded the limits of temperance and good manners." (556 F.2d at 116, App. A of Petition, p. 4A) For example, referring to Audubon's opposition to DDT, petitioner Dr. J. Gordon Edwards wrote to the Editor of the *Audubon Magazine* on February 17, 1970 that "I still find it incredible that the Audubon Society leaders persist in their heavily-financed de facto murder plot against the human race. . . ."

of DDT, and accused them of making "false and misleading" statements and of distorting "the facts for the most self-serving of reasons." It concluded as follows:

> "With increased local coverage by the press of Christmas Bird Count activities, it is important that Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of *not more birds, but more birders.* Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about." (emphasis in original)

Believing the charges to be newsworthy, Devlin telephoned Robert S. Arbib, Jr. the Audubon editor who had signed the Foreword, and asked Arbib to identify the unnamed persons he referred to in the Foreword as paid liars. (Tr. 65-68, 434-35)* Arbib, after initially declining to provide any names, passed on Devlin's inquiry to Roland C. Clement, Vice President of the Audubon Society and a respondent herein, who gave Arbib a written critique of the pro-DDT views of five scientists he had prepared for publication. (Tr. 438, 501) Arbib then furnished Devlin with five names drawn from Clement's article, including the names of petitioners Dr. J. Gordon Edwards, Dr. Thomas H. Jukes and Dr. Robert H. White-Stevens. (Tr. 441)** What was said at this time later was disputed by Devlin and Arbib, in the one factual controversy that arose in this litigation with respect to the *Times.* Arbib testified that when he gave Devlin the scientists' names, he specifically cautioned the reporter

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* References are to page numbers of the Joint Appendix filed with the Court of Appeals.

** Arbib, in his testimony, disclaimed knowledge when he wrote the Foreword of any particular scientists to whom the Foreword related. (Tr. 444)

that the named individuals were to be referred to as misusers of Audubon data, not as persons who were paid to lie. (Tr. 440) Devlin denied receiving any such warning. (Tr. 133-34)

After his interview with Arbib, Devlin attempted to reach the scientists who had been named by the Audubon editor, and was successful in contacting three of them. He spoke with Dr. White-Stevens and Dr. Jukes, who denied the Audubon charges. (Tr. 164, 291-92) Both followed up their conversations with Devlin by sending him letters enclosing scientific literature on the DDT question. (795e-970e, 689e-741e) Devlin also spoke with Dr. Donald A. Spencer, who called the Audubon charges "almost libelous." (Tr. 75)

On August 14, 1972, the *Times* published, under the headline "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count," an article by Devlin concerning the Audubon Foreword. The article quoted and discussed the Foreword, named the five scientists who had been cited by Arbib in his interview with Devlin and summarized the reactions and denials of the scientists to the Audubon charges.

On the morning of the *Times'* publication, Clement drafted a letter to the *Times,* read it over the telephone to Arbib who was out of town and sent it out over Arbib's signature. (Tr. 462-64, 504) The letter, which was not published by the *Times,* referred to "Jack Devlin's punchy piece" and concluded with the following paragraph:

> "Nor do we like to call people liars, but those who have most consistently misused our data—Robert H. White-Stevens of Rutgers University, Thomas H. Jukes of the University of California, J. Gordon Edwards of San Jose State College, Donald A. Spencer of the National Agricultural Chemicals Association, and more recently Nobel laureate Norman E. Borlaug

> —certainly have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy."

Petitioners filed suit against the *Times* and Audubon in April 1973, later joining Arbib and Clement as defendants. As it relates to the *Times*, the complaint alleged that in reporting the charges made by Audubon, the *Times* had published defamatory falsehood about the plaintiffs with malice. Counsel for plaintiffs conceded at trial that no charge of actual malice in the sense of knowing falsity had been made against the *Times* but rather the allegation against the *Times* under the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), "depends squarely upon the second branch, that is, a reckless disregard as to whether the matter was true or not." (Tr. 407)*

Proceedings in the District Court

On January 23, 1976, the District Court, Hon. Charles M. Metzner, U.S.D.J., ruled that Drs. Edwards, White-Stevens and Jukes were public figures in the context of this action,** and denied motions made by the various defendants for summary judgment on the ground that triable issues of fact had been raised in pretrial discovery. (App. D of Petition) When motions for reargument and certification of that decision to the Court of Appeals under 28 U.S.C. § 1292(b) (1970) were made, Judge Metzner granted reargument but adhered to his prior ruling denying summary judgment. (411 F.Supp. 744) His opinion with respect to the *Times* (which also denied certification) was based in its entirety on the existence of a single factual issue which

* The District Court later ruled, in denying the motion of the *Times* for judgment *n.o.v.*, that "[i]t cannot be said that the *Times* knew that the statements in the story were false." (423 F.Supp. at 519, App. C of Petition, p. 28A)

** This ruling was not thereafter challenged by plaintiffs.

was held to preclude the granting of summary judgment: conflicting deposition testimony of Arbib and Devlin as to what was said in the telephone conversation during which Arbib furnished Devlin with the scientists' names later published by the *Times*. Judge Metzner concluded that summary judgment could not be granted in the face of such conflicting testimony, because:

> "In essence, we are confronted with what may be called a 'one on one' situation. If the finder of the fact believes Arbib and disbelieves Devlin, then a jury would be justified in finding plaintiffs have sustained their burden of showing actual malice." *Id.* at 746.

The action was then tried and on June 9, 1976, following five days of trial, the jury returned a verdict against the *Times* and Audubon defendant Clement. The jury awarded compensatory damages against the *Times* and Clement with respect to the *Times* article of August 14, 1972 in the amounts of $21,000 to Dr. Edwards and $20,000 each to Dr. Jukes and Dr. White-Stevens. An additional $1.00 in compensatory damages was awarded to each plaintiff against Clement with respect to his letter of August 14, 1972 to the *Times*. No punitive damages were awarded.

The *Times* and Clement filed motions for judgment notwithstanding the verdict, both of which were denied in separate opinions issued in December 1976 by Judge Metzner. (423 F. Supp. 516, App. B and C of Petition) In his opinion as to the *Times*, Judge Metzner interpreted the jury verdict against both the *Times* and Clement as reflecting the jury's belief that the *Times* accurately reported the Clement-Audubon charges,* but cited the denials of the scientists and the scientific material furnished to Devlin by Drs. Jukes and White-Stevens in holding that the verdict against the *Times* was supported by clear and convincing

* *See* note at pp. 9-10, *infra*.

proof that Devlin's article was published with reckless disregard of the truth. (423 F. Supp. at 519, App. C of Petition, pp. 26A-29A)

The Decision of the Court of Appeals

The decision of the Court of Appeals for the Second Circuit from which a writ of certiorari is now sought reversed the judgments against the *Times* and Clement and dismissed the complaint. In an opinion by Chief Judge Irving R. Kaufman writing for a unanimous panel (comprised, as well, of former Justice Tom C. Clark of this Court and Judge William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation) the Court held that as libel law had developed since *New York Times Co.* v. *Sullivan, supra,* the verdict against the *Times* was constitutionally impermissible. In so holding, the Court initially noted that

> "Implicit in the jury's verdict against Clement is the finding, which we must accept, that the *Times* accurately reported the five scientists whose names were furnished by Arbib were the 'paid liars' referred to in the *Amercian Birds* Foreword." (556 F.2d at 120, App. A of Petition, p. 13A)

The Court also observed that "Devlin reported Audubon's charges fairly and accurately," without espousing the accusations themselves, and that he "published the maligned scientists' outraged reactions in the same article that contained the Society's attack." (556 F.2d at 120, App. A of Petition, p. 14A) In light of the protection afforded in the case law to such reports of statements by third parties, the Court concluded:

> "We believe that the *New York Times* cannot, consistently with the First Amendment, be afflicted with a libel judgment for the accurate reporting of newsworthy accusations made by a responsible and well-noted organization like the National Audubon Society." (556 F.2d at 122, App. A of Petition, p. 19A)

The Court of Appeals further held that the evidence submitted at trial was "manifestly insufficient" to meet the demanding standard of *New York Times Co.* v. *Sullivan,* even absent special First Amendment protection for neutral reportage. The Court rejected as a possible basis for a finding of actual malice against the *Times* the denials by the accused—which the Court noted are "commonplace in the world of polemical charge and countercharge"—as well as the "mass of materials" sent Devlin by the scientists which were, in any event, "largely irrelevant to the Bird Count controversy, and completely irrelevant to the assertedly libelous accusations of the Audubon Society." (556 F.2d at 121, App. A of Petition, pp. 15A-16A)

Rehearing *en banc* was sought by petitioners and denied on July 20, 1977.

ARGUMENT

The essence of the jury finding in this case was—as the District Court and the Court of Appeals both held—that the *Times* had *accurately* reported that the five scientists identified by Arbib were those referred to as paid liars in the Audubon Foreword.* Given this factual finding, peti-

* Both courts were plainly correct on this point. If the jury had believed otherwise, it could hardly have held against Clement with respect to the *Times* article of August 14 since, plainly, to the extent the *Times* printed information that Clement did *not* cause to be furnished to it, or, alternatively, printed information which was contrary in fact to that provided it as a result of Clement's efforts, there could have been no basis for finding Clement liable. New York law has long held that when a second party distorts information furnished it by another into a libel, the first party bears no responsibility for the libel. *Seroff* v. *Simon & Schuster,*

tioners have utterly failed to cast doubt on the correctness of the Court of Appeals' holding that the libel judgment against the *Times* was constitutionally impermissible—let alone to set forth a basis for review by this Court of that decision.

The holding of the Court of Appeals is entirely consistent with case law since *New York Times Co.* v. *Sullivan* affording protection to news reports describing (without commenting on the truth of) newsworthy accusations made against public figures. It is, in fact, based upon the ruling of this Court in *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971). In that case this Court held that the omission of the word "alleged" from a *Time* magazine article summarizing a federal commission's report on police brutality failed to create a jury issue of actual malice, although the omission was done knowingly and caused the article to convey an erroneous impression that the commission had adopted as fact the allegations of a complaint filed in federal court. In the Court's view, the belief of *Time* employees, even if misguided, that their article fairly stated what the commission had said, provided no basis for an inference by the jury of actual malice. The Court held that, at most, defendants had committed an error of editorial judgment in adopting "one of a number of possible rational interpreta-

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Inc., 6 Misc.2d 383, 391, 162 N.Y.S.2d 770, 777, 778 (Sup. Ct. N.Y. Co. 1957), *aff'd*, 12 App.Div.2d 475, 210 N.Y.S.2d 479 (1st Dep't 1960), *app. denied*, 12 App.Div.2d 755, 210 N.Y.S.2d 1000 (1st Dep't 1961). It has likewise been held that a person who gives a defamatory statement to a newspaper which later prints it "is responsible for any damage caused by the publication," but only "to the extent that the article represents an accurate statement" of what he said. *Campo* v. *Paar*, 18 App.Div.2d 364, 367-68, 239 N.Y.S.2d 494, 498 (1st Dep't 1963). *See also, Storch* v. *Gordon*, 23 Misc.2d 477, 479, 197 N.Y.S.2d 309, 312, 313 (Sup. Ct. Kings Co. 1960); *Roberts* v. *Breckon*, 31 App.Div. 431, 433-34, 52 N.Y.S. 638, 640 (4th Dep't 1898).

tions of a document that bristled with ambiguities." (401 U.S. at 290)

The Court in *Pape* attached special significance to the fact that the "news" element of the *Time* article there at issue, like the Devlin article of August 14, 1972, was the making of certain statements by a *third* party, which *Time* itself had not endorsed or adopted. The Court recognized that "a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*." (401 U.S. at 285 (emphasis in the original)) Noting that "[t]he question of the 'truth' of such an indirect newspaper report presents rather complicated problems", the Court indicated the need for special solicitude under the First Amendment for newspaper reports recounting what others have said without taking any independent position on the truth of those statements. (401 U.S. at 286)

Since the *Pape* ruling, the principle that the accurate reporting of charges against public figures made by reliable sources must receive special First Amendment protection has led a number of courts to afford just such protection. While the *Edwards* ruling is the latest—and most thoughtful—of these cases, it is consistent with all of them. Petitioners have cited no cases to the contrary and we are aware of none.

One prior ruling to the same effect as *Edwards* was that of the Court of Appeals for the First Circuit in *Medina* v. *Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971) affirming a lower court's summary judgment for defendants. The challenged story discussed the My Lai tragedy and carried charges made by an independent party claiming that plaintiff had killed a child. On appeal from summary judgment, plaintiff had argued that *Time* was liable for asserting the truth

of charges against the plaintiff contained in a statement made to *Time's* reporter and reprinted in *Time's* story discussing the plaintiff. Finding that *Time* had merely recounted the charges without asserting their truth, the Court held that, under *Pape*, no showing of actual malice could be sustained.

Vandenburg v. *Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975), similarly concludes that a publisher cannot, consistently with the First Amendment, be held liable for reporting accusations made against a public figure by a reliable source, even if the underlying charges reported are later determined to be false. District Court cases with similar holdings include *Thuma* v. *Hearst Corp.*, 340 F.Supp. 867 (D.Md. 1972); *Novel* v. *Garrison*, 338 F.Supp. 977 (N.D.Ill. 1971); and *Oliver* v. *Village Voice, Inc.*, 417 F.Supp. 235 (S.D.N.Y. 1976).

These cases, together with the *Edwards* decision, do no more than reaffirm what we believe should be a self-evident proposition—that the press must be free to report accusations such as those reported by the *Times* without bearing the responsibility for their underlying truth. It should be clear, for example, that if a candidate for the office of Vice President of the United States makes defamatory statements about a rival candidate, the press may freely report them, *regardless* of the views of the journalists or editors as to the truth of the charges. Of course, it is well established, as the Court of Appeals recognized, that a publisher may be held liable for reporting defamatory charges that he "in fact espouses or concurs in . . . [or] deliberately distorts." (556 F.2d at 120, App. A of Petition, p. 14A) But if, as here, the charges are reported fairly and reasonably accurately, in the words of the Court of Appeals, "[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands

that the press be afforded the freedom to report such charges without assuming responsibility for them." (556 F.2d at 120, App. A of Petition, p. 14A) The petition for certiorari, having failed to cite a single case to support a contrary result, let alone a single supportable policy reason for such a result, provides no basis for review by this Court.

The alternative holding of the Court of Appeals itself suggests the undesirability of plenary review by this Court. The determination that "[e]ven absent the special protection afforded to neutral reportage, . . . the evidence adduced at trial was manifestly insufficient to demonstrate 'actual malice' on the part of the *Times*" * is precisely the sort that this Court has frequently refrained from reviewing. *See, e.g., Bandelin* v. *Pietsch*, 98 Idaho 337, 563 P.2d 395 (1977), *cert. denied*, 46 U.S.L.W. 3202 (U.S. October 11, 1977); *Hotchner* v. *Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3216 (U.S. October 3, 1977); *Kapiloff* v. *Dunn*, 27 Md. App. 514, 343 A.2d 251 (Ct. Spec. App. 1975), *cert. denied*, 426 U.S. 907 (1976).

Moreover, the decision of the Court of Appeals as to this issue was plainly correct. At the heart of the allegations of reckless disregard made in the petition for certiorari is the notion that having received denials of the Audubon charges from the three scientists called by Devlin and having received information from two of the scientists setting forth their scientific positions, the *Times* should not have printed the story without more investigation and/or verification. But the law simply does not permit reckless disregard to be so divined. In both *New York Times Co.* v. *Sullivan*, *supra*, and *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the failure to engage in precisely such

* 556 F.2d at 120, App. A of Petition, p. 15A.

pre-publication investigations was held to be inadequate as a matter of constitutional law to sustain findings of liability. As this Court explained in *Sullivan,* evidence of an inadequate investigation "supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." (376 U.S. at 288)

Petitioners cite no authority to challenge the Court of Appeals' finding that the fact of the plaintiffs' denials of the Audubon charges was insufficient to support a verdict against the *Times.* Apart from what we believe to be its evident correctness, the Court of Appeals' view that denials from persons criticized are so common as to "hardly alert the conscientious reporter to the likelihood of error," much less provide a basis for liability under the clear and convincing proof standard of *Sullivan,* is entirely consistent with cases such as *Vandenburg* v. *Newsweek, Inc., supra.* Likewise, even if, as petitioners assert, the information on DDT forwarded by the scientists to Devlin discussed Audubon's bird count data (Petition, p. 22), the Court of Appeals' finding is unrefuted that this information, being "completely irrelevant" to the merits of the Audubon charges, could not, consistently with *Sullivan,* conceivably provide a basis for a judgment against the *Times.*•

• We do not deal in this brief with petitioners' suggestion that the Court of Appeals reversed the judgments herein for insufficient proof of knowing falsity, and thus allegedly "severed" the reckless disregard branch of the *Sullivan* test (Petition, pp. 3, 11), as this either misreads or misrepresents Judge Kaufman's opinion. Quite to the contrary, with respect to the *Times,* Judge Kaufman noted that the propriety of Judge Metzner's finding of recklessness against the *Times* was the sole issue before the Court of Appeals (556 F.2d at 119, App. A of Petition, p. 13A), and that the absence of any issue of alleged knowing falsity was "uncontested." (556 F.2d at 120, App. A of Petition, p. 15A)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77—576

J. Gordon Edwards, Ph.D., Thomas H. Jukes, Ph.D.,
Robert White-Stevens, Ph.D.,

Petitioners,

v.

National Audubon Society, Inc.,
Robert S. Arbib, Jr., Elvis J. Stahr, Jr.,

Defendants,

and

The New York Times Company, Roland C. Clement,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

STATEMENT

In their Petition for Writ of Certiorari filed in this Court on October 18, 1977, petitioners urged, *inter alia*, that the decision of the United States Court of Appeals for the Second Circuit, 556 F.2d 113 (1977), has sought to establish an unprecedented doctrine of privilege in the law of libel involving public figure

plaintiffs. This is the doctrine of "neutral reportage," which is unsupported by *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and later cases decided by this Court. Further, petitioners urged that the Court of Appeals decision is manifestly incorrect with respect to the evidence of record upon which the jury verdict of actual malice was based and sustained by the District Court in its denial of respondents' motions for judgment notwithstanding the verdict.

The briefs which respondents have filed in opposition rely substantially upon cases whose rules of law they misconstrue in their effort to support the decision of the Court of Appeals and to suggest that this case does not warrant review by this Court. Petitioners submit this reply to the briefs of respondents in order that this Court may affirm its commitment to the principles of *New York Times* v. *Sullivan*, which principles have been extensively modified by the Court of Appeals.

ARGUMENT

I.

RESPONDENT TIMES' ASSERTION THAT THE "ACCURATE" REPORTING OF CHARGES AGAINST PUBLIC FIGURES MADE BY "RELIABLE" SOURCES IS ENTITLED TO SPECIAL FIRST AMENDMENT PROTECTION MISCONCEIVES THE RULINGS OF *NEW YORK TIMES V. SULLIVAN* AND LATER CASES RELIED UPON BY THE TIMES, AND, MOREOVER, SUCH ASSERTION IS NOT JUSTIFIABLE IN LIGHT OF THE FACTS OF THIS CASE.

In framing the question presented for review (T, p. 2), * the Times must now bear the burden of the Court of Appeals' novel

*Citations indicating page numbers refer to page numbers in the briefs of respondents Times (T, p..) and Clement (C, p..) in opposition to the Petition for Writ of Certiorari.

pronouncement that the "accurate" reporting of charges against public figures warrants constitutional immunity from liability for libel. However, in so doing, it is equally clear that the Times must assert as an undisputed fact what has been, and remains, among others, a factual controversy central to this litigation—whether Arbib (of Audubon) warned Devlin (of the Times) that the Audubon Foreword did not specifically accuse plaintiffs of being 'paid liars.' This must have created serious doubts in Devlin's mind as to the truth or falsity of the Times article of August 14, 1972, according to the verdict of the jury. Contrary to the Times' assertion that Audubon did make these charges as to petitioners (T, p.3), the record is replete with testimony from Arbib that Devlin was cautioned that no such specific character attacks were ever made or intended by the Foreword to *American Birds*, both by express warning, by Arbib's extreme reluctance to provide Devlin with any names, and by the denials of two of the three petitioners herein. From this testimony flows the inevitable conclusion that the Foreword in itself was not a newsworthy document but rather, that Devlin, realizing an opportunity to sensationalize an otherwise neutral statement, sought to and did create a newsworthy story to titillate the public by dramatizing as a fact (that petitioners were paid liars) an accusation that even the orignal source has denied. The Times concedes that this factual controversy exists (T, pp. 4, 5, 6, 7) and then proceeds to argue that a finding of accurate reporting has, in other cases, "led a number of courts to afford. . . special First Amendment protection" (T, p. 11).

In similar fashion, the Times adopts in its brief in opposition to the Petition for Writ of Certiorari, the Court of Appeals' alternative holding that the evidence of record failed to demonstrate 'actual malice' on the part of the Times (T, p. 13; Petitioners' Appendix, p. 15A). In so doing, the Times either misreads or misrepresents petitioners' position by the Times' assertion that the Court of Appeals' finding is *unrefuted* that the preliminary information and data forwarded to Devlin by petitioners concerning the interpretation of Audubon's published statistical bird count data is "completely irrelevant" to the merits of the Audubon charges. (T, p. 14).

Indeed, this assertion of the Times of the Court of Appeals For the Second Circuit finding is refuted by the evidence itself.[1] Exhibit Number 6 is an article authored by Philip H. Marvin which states that, upon the basis of Audubon bird count data, avian populations increased dramatically despite the advent of pesticides. Exhibit Number 14 contains, among other things, an article written by Dr. Jukes in which is found the Audubon Christmas Bird Count Data Table 1. Both exhibits were unchallenged by defendants.

After Devlin's telephone conversations with Drs. Jukes and White-Stevens, well prior to publication of the Times' August 14th article, both scientists included in their mailings to Devlin Audubon's own published tabulations of bird counts which demonstrated clearly that between the years 1941 and 1960 many of the bird species counted by Audubon observers had experienced marked population increases when counted on a per observer basis. Confronted by the startling clarity of these documents (which were based on Audubon's own data), it is inconceivable to argue that Devlin acted with other than reckless disregard for the truth of Audubon's 'paid liar' accusation in preparing the libelous article for publication. Likewise, the Court of Appeals' utter disregard for this uncontroverted and most pertinent evidence underscores petitioners' assertion in Part III of their main brief that the review of the record by the Court of Appeals was manifestly erroneous.

A close examination of the cases cited by the Times as authority for the newly-forged "neutral reportage" doctrine discloses that the Times' reliance on these cases is wholly misplaced. The Times correctly points out the holding of this Court in *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971) (T. p. 10), but fails to note that the only question before the Court was whether the *Sullivan* "actual malice" test had been correctly applied to the facts of the case. 401 U.S. at 284. Thus, to argue that the Court of Appeals holding in this case is based upon the ruling of *Pape* (T. p. 10) is to misread both opinions and to accord misleading significance to dicta in *Pape*, 401 U.S. at 285-86, by confusing such dicta with the *ratio decidendi* therein.

[1]Petitioners have sustained throughout vigorous objections to the Court of Appeals' mischaracterization as "irrelevant" the exhibits appearing in Appendices A and B of this brief.

The same can be said of the Times' citation of *Medina* v. *Time, Inc.*, 439 F. 2d 1129 (1st Cir. 1971) as support for the ruling of the Court of Appeals in the instant case. The one essential distinction between *Medina* and this case, which the Times fails to make, is that *Medina* involved a situation in which a story carried charges made by a party about a specifically named individual, whereas in the case now before this Court, the original charges were directed against nobody in particular and these charges would have remained harmless and inert had not Devlin provided targets for the aimless barbs of the Audubon publication. The Court in *Medina* pointedly stated that "the plaintiff does not claim the Times article 'truncated or distorted' the statements it reported," 439 F.2d at 1130, whereas it is self—evident, and amply illustrated in our Petition to this Court, that petitioners took issue from the beginning with Devlin's transformation of the Audubon Foreword from a generalized condemnation of what Audubon considered a misinterpretation of its Christmas Bird Count Data into an *ad hominem* assault on petitioners.

Petitioners find the Times' brief recitation of *Vandenburg* v. *Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975) and three District Court cases as authority for the holding of the Court of Appeals similarly unavailing. The question in *Vandenburg, supra,* at 1027, was "whether [there was] reason to think [the sources of the story] false, reason to question the reliability of (the) sources or to investigate further given all the circumstances," and the court answered in the negative, because independent corroboration of these sources permitted the finding that the story reported was not inherently improbable. *Id.* Ironically, *Vandenburg* does shed light on this case by discussing the duty to investigate the sources of allegedly libelous information:

> "When the story is not *'hot news'*, as is the case here, the investigation must be more thorough, and 'actual malice may be inferred when the investigation

> . . . was grossly inadequate in the circumstances.' Vandenburg v. Newsweek, Inc., supra, 441 F.2d at 380." *Id.* at 1026 (Emphasis added)[2]

The Times also cites *Thuma* v. *Hearst*, 340 F. Supp. 867 (D. Md. 1972) for the proposition that the First Amendment protects a publisher who reports accusations made by a reliable source against a public figure, notwithstanding the falsity of the accusations (T, p. 12). In passing, the District Court noted, *supra*, at 870, that it "appears undisputed that Irwin and therefore Hearst, accurately and truthfully reported what had been said by the family, friends and neighbors. . . when they were interviewed by Irwin." However, it is unmistakably clear that *Hearst* did not enlarge the scope of the publisher's privilege in public figure-libel cases because the court granted summary judgment to the defendant on *Sullivan* grounds, in stating that the deposition testimony of the reporter "does not indicate that. . . at the time of publication [he] *seriously doubted* the accuracy of the opinions of the family, friends and neighbors. . . that the shooting was unjustified." *Id.* at 871 (emphasis added). One need only refer to this Court's holding in *St. Amant* v. *Thompson*, 390 U.S. 727,

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[2]Petitioners also take issue with the Times' statement in its brief that "at the heart of the allegation of reckless disregard made in the Petition for Certiorari is the notion that. . . the Times should not have printed the story without more investigation and/or verification. But the law simply does not permit reckless disregard to be so divined." (T, p. 13). The implication of the Times' statement that investigatory failures may not form part of the evidence of reckless disregard is erroneous. Whether such failure will be treated as part of the proof of reckless disregard depends on a number of considerations. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 157 (1967) (whether story is "hot news"); *Blanke v. Time, Inc.*, 308 F. Supp. 378, 380 (E.D. La. 1970) (whether the necessity to publish was urgent); *Gordon v. Random House, Inc.*, 486 F. 2d 1356, 1363 (3d Cir. 1973), *vacated o.o.g.*, 419 U.S. 812 (1974) (whether "hot news" factor is absent and where defendant is on notice that statements are improbable); *Buckley v. Esquire, Inc.*, 344 F. Supp. 1133, 1135 (S.D.N.Y. 1972) (when plaintiff protested the untruth of an article).

731 (1968) to realize that *Hearst* cannot be taken to support the Court of Appeals decision in the instant case.

Petitioners urge that their Petition and the substance of their claims against the *Times* are not based upon a failure to investigate by the reporter. Rather, this case is one where an investigation was made, and the fruits thereof emphatically disproved the truth of the libelous assertion (that Petitioners were paid liars), which assertion has also been denied by the alleged originator thereof.

Devlin's investigation disclosed three troublesome matters:

> 1.) That Arbib (of Audubon) warned Devlin not to employ the epithet "liar."
>
> 2.) That three of the accused individuals emphatically denied the charges, one of whom admonished Devlin about the potential libel involved.
>
> 3.) That the tabulations of Audubon Bird Count Data indisputably supported Petitioners' positions in respect thereto.

Novel v. *Garrison*, 338 F. Supp. 977 (N.D. Ill. 1971), also cited by the Times (T, p. 12), held that a publisher cannot be held accountable for actual malice in printing the actual statements of an important elected official when these statements had been made in an interview with that official, and the official approved the entire article in galley proof form prior to its publication. *Id.* at 982-83. Thus, *Garrison* correctly points out that when a publisher has made a reasonable effort to verify the truth of what he intends to print, and the original source collaborates in the final publication, the 'actual malice' test (in the sense of reckless disregard) is not satisfied. No such reasonable efforts to substantiate the truth of the 'paid liar' epithet can be attributed to Devlin, considering the circumstance of repeated indications of falsehood; nor can it be asserted that Arbib ever approved the Times' August 14th article, either prior to publication or afterwards. Indeed, at trial Arbib stated that he disagreed in form

and substance with Clement's letter to the Times endorsing the article, which was mailed on the day the article appeared in print.

Oliver v. *Village Voice, Inc.*, 417 F. Supp. 235 (S.D.N.Y. 1976), also cited by the Times (T, p. 12), stands for an altogether different rule of law than that asserted by the Times. Relying on *Pape*, the court in *Oliver* held that defendant's failure to report the secondary source of the information, which formed the basis of the action for libel, was insufficient evidence of actual malice to withstand a motion for summary judgment:

> "The alleged error is not of the type which by its sheer implausibility should have put the publisher on notice of its falsity, and it is limited to the question of attribution, a shadowy area where the court has stated that the publisher must not be held liable for all the arguable mistakes of his reporters." *Id.* at 239.

If all that was involved in this case was a mere omission on the part of the Times to report Audubon as the source of its article, the disposition of this case might have occurred at an earlier stage of the proceedings. However, Devlin's role as *agent provocateur* in eliciting from Arbib the names of petitioners, and naming Arbib as the source of the accusation that petitioners were paid liars, despite Arbib's warnings to the contrary, creates precisely the inverse of the situations treated in *Pape* and *Oliver*. Indeed, Devlin's attribution of Arbib as the source of the libel in the Times article, after Arbib told Devlin the Foreword was not written with anyone specific in mind, demonstrates an unmistakable disregard for the truth on the part of the Times.

Petitioners submit that the legal authorities offered by the Times in its efforts to offer decisional authority supportive of the Court of Appeals restructuring of the 'actual malice' test of *Sullivan* fall far short of their purported mark, and are in no way grounds for the enlargement of the First Amendment privilege granted to the press by the Court of Appeals For the Second Circuit.

II.

RESPONDENT CLEMENT'S ARGUMENT THAT THE EVIDENCE OF RECORD FAILS TO SUSTAIN A FINDING OF ACTUAL MALICE AS TO CLEMENT MERELY BRINGS INTO FOCUS PETITIONERS' CONTENTION THAT THE SELECTIVE APPRAISAL OF THE EVIDENCE BY THE COURT OF APPEALS REQUIRES AN IMPARTIAL REVIEW BY THIS COURT.

Respondent Clement argues, *inter alia*, that petitioners' assertion that Clement supplied petitioners' names to Arbib without a word of caution is "directly contradicted by the record" (C, p. 6). In so arguing, respondent refers to a passage in the Court of Appeals' opinion which found that Clement furnished Arbib with these names with the admonition that nobody was being called a paid liar. What respondent Clement fails to explain, however, is why the Court of Appeals chose to accept Clement's trial testimony, (which had been rejected by the jury and the trial court) and discredit Arbib's testimony to the contrary, when the record is undisputed that Clement was thoroughly familiar with the adversaries on both sides of the DDT controversy, and had aligned himself years ago with the anti-pesticide forces.

Likewise, respondent fails to address Clement's August 14th letter to the Times, which letter candidly conveyed his defamatory intent by approving the manner in which his information had been employed by the Times to malign petitioners. Respondent's only allusion to this self-indicating missive is the Court of Appeals' finding that Clement did not endorse the 'paid liar' accusation (C, p. 6). However, it is significant and telling that respondent Clement similarly omits reference to Part IV of the Court of Appeals opinion which exculpates Clement from liability because, as explicated in the Petition, there is simply no basis for concluding that the use of the word "paid" before "liar" is a prerequisite to defamation liability.

Petitioners submit that these illustrations of the deficiencies in the position of respondent Clement and the arbitrary manner in which the examination of the record was undertaken by the Court of Appeals in concluding that Clement's participation in the events that culminated in this litigation was insufficient to support the jury verdict, provide ample basis for review of the scope and propriety of the appellate function as exercised by the Second Circuit Court of Appeals in reversing the judgment against Clement.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Petitioners' main brief, Petitioners respectfully urge that the Petition for a Writ of Certiorari be granted.

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APPENDIX A

PESTICIDE INFLUENCE ON BIRD POPULATION

Philip H. Marvin

Spring will be strangely silent claims a recent monthly book selection. The songs of birds will be stilled. No longer will we hear the spring peepers. The new growing season will be ushered in the tomb-like quietness. Pesticide chemicals, according to the authoress of this book, are destroying such harbingers of spring along with other wildlife. Robins, she intimates, are on their way to extinction. Increased chemical control of insects, weeds and other pests has produced in large areas springs now unheralded by the return of birds and where the early mornings are strangely silent where once they were filled with the beauty of song birds is the theme of a chapter.

Facts show this to be a misrepresentation. Rather than decreasing, bird populations have increased tremendously during the past decade of greatly increased usage of modern insect and weed control chemicals. The book does give an emotionally convincing story. Cold figures prove the conclusions to be in great error.

Data accumulated by bird watchers and published by the National Audubon Society with the United States Fish and Wildlife Service refute such conclusions. The data show a population explosion among birds while the insecticides and herbicides have reached their greatest use in protecting our crops, foods, forests, city trees, yards and homes.

Bird watchers, the author of this paper being one of them, take an annual census of birds in North America. The counting started in 1899 thru the initiative of the famous naturalist, Dr. Frank M. Chapman, Nearly 9,000 ornithologists now take the annual census. They go in groups or singly to find how many birds of each species they can observe. The counts are made during Christmas week, and are popularly known as the Christmas Bird Counts. Stringent rules make the counts reliable for comparison over the years.

"The Christmas Bird Counts serve as a good inventory of our December birdlife. No other month of the year receives such intense wide-spread coverage.", wrote the world famous ornithologist, Allen D. Cruickshank (Audubon Field Notes 11:(2), 1951). He also described this census as, "The Christmas Bird Count is probably the longest organized cooperative bird watching activity in the entire world." (Audubon Field Notes 12:(2), 1956). These annual records give the most accurate picture of our bird populations.

Data from the Christmas Bird Counts are published in Audubon Field Notes, a periodical sponsored by the National Audubon Society and the U.S. Fish and Wildlife Service. The figures in the table below, taken from this magazine, show a steady growth in bird populations according to the Christmas Bird Counts:

YEAR	Total Birds Recorded	Number of Observers
1940	2,000,000	2,200
1945	3,136,000	2,300
1950	6,469,000	4,875
1951	7,507,000	5,151
1952	12,158,000	---
1953	(Not summarized in Audubon Field Notes)	
1954	17,648,000	7,612
1955	24,883,000	6,331
1956	18,911,000	6,543
1957	35,146,000	5,927
1958	33,891,000	7,438
1959	32,710,000	8,000
1960	52,524,000	8,928

Many reasons can be given as causing this bird population explosion. It will suffice here to point out that the meteoric rise in the two decades accompanies the great increase usage of pest control chemicals.

Individual bird species, closely associated with the use of pesticides, show corresponding rises in populations according to the data in the Audubon Field Notes. Robins, according to the quiet spring book, have been reduced to the verge of extinction. The reliable data show robin populations increasing almost ten-fold in the last dozen years.

YEARS	AVERAGE ANNUAL ROBIN COUNTS
1949–52	41,214
1953–56	86,386
1957–60	367,733

This rise in the number of robins accompanied the increase spraying to protect city trees from attack by insects. Robin populations actually are increasing at a faster rate than starling, as shown by the following:

YEARS	AVERAGE ANNUAL STARLING COUNT
1949–52	717,477
1953–56	1,561,710
1957–60	5,799,820

Although the rate of increase is greater for robins, starlings have increased much more in numbers. Both species feed on the grubs, earthworms, beetles and other food in the lawns under the trees sprayed for control of Dutch elm disease, canker worms, elm leaf beatle and other pests.

Many other home yard birds show rises in populations during this period when chemicals have been relied upon increasingly more for insect and weed control, as shown by the following figures, also taken from the Christmas Bird Counts:

YEARS	AVERAGE ANNUAL COUNTS			
	Mourning Dove	Flicker	Mockingbird	Cardinal
1949–52	13,131	4,278	4,430	19,576
1953–56	32,752	5,980	9,802	31,375
1957–60	59,886	7,500	14,027	43,191

(Note: figures for 1953 not included for the first three birds, as such were not summarized in Audubon Field Notes.)

An explanation may be in order as to why these particular yard birds were selected. The mourning dove lives in mid-western cities, making loosely built nests which direct spray streams could knock apart. Yet this species has increased over 4-fold. The flicker, described as the best known woodpecker to urban people,

continues to increase despite the spraying of its environment. The song of the mockingbird, so well publicized by verse, is far from silent, despite imported fire ant control programs in the South. The flashy cardinal, a seed eater and nesting in shrubs, shows an increase, but less so than other species directly associated with the sprayed trees.

Many species of birds associated with agriculture also show tremendous rises in populations in the past 12 years, according to the Audubon Field Notes. Crows have doubled in numbers, from 107,441 to 227,302; despite their close associations to cutworms and other field insects which farmers so frequently need to control with chemicals to stay in the business of producing our food and clothing crops. The killdeer, a bird of chemically treated meadows and other open ground, increased from 6,523 in 1949 to 18,191 in 1959. The redwing blackbird, jumping from 1,399,466 to a whopping 20,049,213, probably is our most common bird. Its gigantic increase coincided with the increase spraying of its marsh habitats for mosquito control.

While the total bird populations have been increasing, local bird numbers may vary for any of a number of reasons. Man may be responsible for some, natural conditions for others. In either case, the changes more likely are shifts in populations. A tree falling in a forest starts a new ecological succession in a localized area. Birds and other animals living in the tree move to new quarters. Sunlight, now penetrating to the forest floor, gives grasses and shrubs the conditions they need for growth. New species of birds, associated with such plants, move in. The same process occurs when fires, started by lightning, wipe out the existing vegetation over large areas and new plants then establish themselves.

The authoress of the silent vernal season book claims that the balance of nature is a fluid, ever shifting condition, in a constant state of adjustment. Man, she points out, is a part of this balance. This is a very agreeable statement. Man-made objects may kill many birds. Over 20,000 birds were reported killed by TV towers in the autumn of 1960 (Audubon Field Notes 15:(1):78) Yet, by putting up bird houses, by maintaining feeding

stations and by keeping bird baths supplied with water, we perpetuate many birds which the rigors of nature would otherwise eliminate.

No one knows what the future population counts of birds will be. The great rise in their numbers opens them up to epidemics of communicable diseases. Since there are so many more birds present, people will be finding the dying and dead ones much more readily, whether the birds die from diseases, accidents or other causes. At times pesticides will be blamed, with justification in some instances. More frequently, pesticides will be incriminated by association without just reason. This has happened in the past. Bluebirds have been on the decline since 1957. The imported fire ant control program in the South was said to be the cause, since so many bluebirds migrated to such areas for the winter. However, as recently reported in Audubon Field Notes (_____, 1962), decreases showed up in the bluebird populations which never visited the areas of imported fireant eradication. Probably severe winter weather has been responsible, as Forbush noted for bluebirds in the last half of the previous century (*Birds of Massachusetts and Other New England States*, Vol. 3, p. 419).

When bird populations drop or shift, the temptation to accuse insect and weed control activities will be great. Frequently it is the easy way to solve a problem, even if the solution is erroneous. All factors need to be considered by well trained persons to approach the truth. Reliable scientists use as much data and facts as possible in drawing conclusions. *Many others rely on single observations and even on incorrect conclusions of others. Emotional appeal sways the masses, at times to acts of foolishness. It requires strong character to ascertain the facts in order to see reality accurately.*

The booming insect and weed killing chemical business has been well matched by the soaring populations of birds, despite claims to the contrary. Misuse of pesticides occurs occasionally. Misuse of ideas, as noted in this article, has been more flagrant. Both are to be deplored. The poisoned pen can be the more detrimental to man when it initiates unwise action. The public needs facts, not misconceptions, to act with sound judgement.

APPENDIX B

Table 1
Audubon Society Christmas Bird Count Data[a]
1941 (2,331 observers) vs. 1960 (8,928 observers)

Species	Count		Count/Observer		Ratio per Observer
	1941	1960	1941	1960	1960/1941
Eagle	197	891	0.08	0.10	1.25
Gull	124,470	635,642	53.40	7.20	1.33
Raven	667	2,699	0.29	0.30	1.03
Crow	185,519	250,307	79.59	28.04	0.35
Quail	2,060	10,276	0.88	1.15	1.31
Pheasant	6,839	19,731	2.93	2.21	0.75
Mourning Dove	7,411	72,958	3.18	8.17	2.57
Swallow	14,347	242,303	6.15	27.14	4.41
Grebe	2,501	27,826	1.07	3.12	2.92
Pelican	4,450	10,562	1.91	1.18	0.62
Cormorant	3,246	27,162	1.39	3.04	2.19
Heron	2,254	16,253	0.97	1.82	1.88
Egret	1,469	16,800	0.63	1.88	2.98
Swan	18,554	33,994	7.96	3.81	0.48
Goose	182,820	696,777	78.43	78.04	0.99
Duck	2,137,093	2,739,517	916.81	306.85	0.33
Blackbird	137,502	20,552,375	58.99	2,302.01	39.02
Grackle	24,937	12,570,458	10.70	1,407.98	131.59
Cowbird	40,019	3,286,314	17.17	368.09	21.44
Chickadee	21,330	55,906	9.15	6.26	0.68
Titmouse	5,038	18,268	2.16	2.05	0.95
Nuthatch	4,214	13,439	1.81	1.51	0.83
Robin	19,616	928,639	8.41	104.01	12.37
English sparrow	53,335	358,796	22.88	40.19	1.76
Bluebird	3,742	6,903	1.60	0.77	0.48
Starling	211,836	8,673,095	90.88	971.45	10.69

[a]42nd Christmas Bird Count, *Audubon Magazine*, 1942, 61st Christmas Bird Count, *Audubon Field Notes* 15: 1961.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77—576

J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D.,
ROBERT WHITE-STEVENS, Ph.D.,

Petitioners,

v.

NATIONAL AUDUBON SOCIETY, INC.
ROBERT S. ARBIB, JR., ELVIS J. STAHR, JR.,

Defendants,

and

THE NEW YORK TIMES COMPANY,
ROLAND C. CLEMENT,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF AMICUS CURIAE

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To the Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of the Supreme Court, Accuracy in Media, Inc. (AIM) moves for leave to file as amicus curiae the accompanying brief in support of a petition for a writ of certiorari to the Court of Appeals for the Second Circuit filed on October 18, 1977 in the above captioned proceeding.

STATEMENT OF INTEREST AND REASONS FOR GRANTING THE MOTION

Accuracy in Media, Inc. is a non-profit organization dedicated to the public interest in a fair and balanced presentation by the media of the news and objectivity in reporting of issues vital to an informed public. It is supported by public contributions. For over eight years AIM has monitored the daily press as well as broadcasting in an effort to afford constructive criticism of contemporary journalism. AIM maintains no partisan position on critical issues but seeks to encourage ethical and responsible practices on the part of journalists. The organization has accumulated considerable experience as the result of a variety of complaints it has received from the public in relation to grievances against the media. As a public interest group, we seek by this motion the opportunity of supporting the petitioners, since we believe the issues at stake on this appeal are of wide concern to the public at large and to the future of responsible journalism.

We live in an age where the mass media are capable of moulding public opinion to an extent unprecedented in history. It becomes imperative that the immunity of the press under the First Amendment is not construed by irresponsible journalists as a license to distort public issues under the guise of assailing the integrity of the "public figures" who are the protagonists in the market place of ideas. Investigative reporting has a long and honorable tradition in American journalism, but an understanding of contemporary social and political problems is not illuminated by an exclusive pursuit of sensationalism in reporting the news. The complex issues of urban renewal, poverty, civil rights, housing problems and strategic arms limitation, inter alia, require balance, fairness and some depth of understanding on the part of journalists if they are to make clear to the public the merits of proposed solutions to such issues. This is not to denigrate the importance of investigation of corruption on the part of "public officials" but that is a far cry from an irresponsible assault on the character of "public figures" on whom we depend for enlightenment and the civility of intelligent discourse free from the constraints of potential libel.

For, if "public figures" become fearful of engaging in the market place of ideas, then a democratic society will have suffered an irreparable injury. If the constitutional immunity of the press were to be extended beyond the limits of *New York Times v. Sullivan*, as the holding of the Circuit Court of Appeals indicates, the opportunity to abuse the privilege and power of influencing public opinion by the media would receive judicial sanction.

The prayer of petitioners, which we adopt, is set forth in their petition as follows:

Petitioners, Dr. J. Gordon Edwards, Dr. Thomas H. Jukes and Dr. Robert White-Stevens, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing the decision of the United States District Court for the Southern District of New York, granting a judgment in favor of plaintiffs after a jury verdict awarding Dr. Edwards $21,000 against the New York Times and Roland C. Clement for the Times article and $1.00 against Mr. Clement for the August 14, 1972 letter, and awarding Dr. Jukes and Dr. White-Stevens $20,000 each against the Times and Roland Clement for the Times article and $1.00 each as against Mr. Clement for the August 14, 1972 letter, the total thereof being $61,003.00.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 25, 1977. A petition for rehearing with a suggestion for rehearing en banc was filed on June 8, 1977, and denied on July 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit Court of Appeals has expanded the scope of immunity of the press from defamation suits by public figures beyond the intention of *New York Times v. Sullivan?*

2. Whether the First Amendment protects the New York Times from a suit for libel predicated on a concededly unwarranted assault on the reputation of several distinguished scientists despite a jury's finding that the publication was made in reckless disregard of whether it was false or not?

3. Whether the Second Circuit Court of Appeals opinion has virtually written a new version of *New York Times v. Sullivan* by holding that if a journalist "accurately" conveys the charges made by others he is immune from defamation suits unless the publisher expresses or concurs in the charges or launches a personal attack of his own?

4. Whether these newly-developed criteria undermine any possibility, and indeed even the relevance, of demonstrating through circumstantial evidence that the reporter was reckless and/or was aware of the baseless nature of the accusations?

5. Whether the departure from the holding of *New York Times v. Sullivan* will result in the complete emasculation of any possible libel suits in the future by a public figure with the chilling effect of inhibiting any reputable scientist from risking his integrity and reputation by entering into public debate, to the serious detriment of the peoples' right to know?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, which reads in relevant part:

> Congress shall make no law... abridging the freedom of speech, or of the press...

as made applicable to the States by the Fourteenth Amendment.

STATEMENT OF THE CASE

Although we concur substantially in the statement of the case by petitioners, we believe it important to highlight the salient facts of the proceeding below.

On August 14, 1972, there appeared in the New York Times an article headlined "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." This article appeared under the by-line of the Times reporter John Devlin. The so-called "spokesmen" for the pesticide industry referred to (and named by Devlin) were in fact five distinguished scientists, including a Nobel prize laureate. Devlin's article in the New York Times opens as follows:

> Pesticide Spokesmen Accused
> Of 'Lying' on Higher Bird Count
> by John Devlin
>
> "Segments of the pesticide industry and certain 'scientist-spokesmen'" are accused in the current issue of American Birds of "lying" by saying that bird life in America is thriving despite the use of DDT.

The malicious nature of Devlin's article is aptly characterized by the Court of Appeals:

> "....the Audubon Society's principal charges, as reported in Devlin's article for the Times, went far beyond a mere accusation of scientific bad faith. The appellees were charged with being "paid to lie". It is difficult to conceive of any epithet better calculated to subject a scholar to the scorn and ridicule of his colleagues than "paid liar". It is this completely foundationless accusation of venality that constitutes the essence of the calumny against the appellees." (17A)*

Furthermore, the Court of Appeals decision stated that: "to call the appellees, all of whom were university professors, *paid* liars clearly involves defamation that far exceeds the bounds of the prior controversy. No allegation could be better calculated to ruin an academic reputation. And, to say a scientist is *paid* to lie implies corruption and not merely a poor opinion of his scientific

*(Citations terminating in "A" refer to page numbers in the Appendix to Petitioners' Brief)

integrity. Such a statement requires a factual basis, and no one contends there was any serious basis for such a statement in this case.". (Footnote 5, 16A)

Nor, indeed, does the Court of Appeals "condone the mischievous and unwarranted assault on the good name of the appellees." As to the respondent Clement, Vice-President of the Audubon Society, the Court indicated that "Clement demonstrated himself quite content to have called the appellees liars. . ." although he never intimated that "they were corrupt." (18A)

One of the more strained conclusions of the Circuit Court of Appeals is that Devlin "'in good faith' elicited both sides of the story to the best of his ability". If so, the results are not apparent in his article, since he studiously refrained from presenting the other side. The article was completely lacking in balance, fairness or objectivity. It is reasonable to exempt factual mistakes by a journalist due to the constraints of a deadline, but to say that any libelous attack on a public figure is "newsworthy" per se (3A) and therefore constitutionally protected regardless of its truth is to put a judicial imprimatur on sensation for the sake of sensation and not for the sake of responsible journalism. To characterize a libel as "newsworthy" is to encourage the practice of libel as a means to achieving a "newsworthy" story, regardless of the consequences. Devlin's highly unreasonable conduct constitutes "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Curtis Publishing Co. v. Butts*, 288 U.S. 130, 155 (1967).

It is the surrounding factual circumstances as found by the Court and jury in the first instance that we wish to outline briefly. In its consideration of the evidence adduced at trial showing actual malice, the Court of Appeals opinion glosses over significant elements of record testimony so as to arbitrarily force the conclusion that Devlin was unaware of the baselessness of the Audubon Society's dramatic allegations. Indeed, the Court engaged in a somewhat dramatic conclusion of its own, i.e., that there was not "a shred of evidence from which the jury might have found that Devlin entertained serious doubts concerning the truth of Arbib's charge that the appellees were 'paid liars'". (15A)

The facts of record show otherwise. The scenario is well portrayed in Petitioners' brief to this Court for a writ of certiorari. Devlin was a reporter of considerable experience "who must have known from the outset that he was dealing with a libelous article." (Finding of Judge Metzner). In search of a hot item (in the otherwise unexciting field of nature reporting) and with a nose trained to smell out potential drama, Devlin sensed an opportunity when he came across the April 1972 issue of American Birds. Normally, ornithologists who engage in the very pleasant occupation of bird watching and act as guardians of bird life are not belligerent people, nor is their occupation amidst pastoral scenery conducive to the passions of ideological controversy. However, the April issue of American Birds reflected a sharpening controversy and rising emotions as to the effect of pesticides on bird life. Specifically, the Foreword to the April 1972 issue of the Audubon Society's publication challenged the conclusion of "segments of the pesticide industry and certain paid 'scientist-spokesmen' that the bird life of North America is thriving and that many species are actually increasing" despite the widespread use of hydrocarbon pesticides. The Foreword to the April issue maintained that such a conclusion is false and misleading, "a distortion of the facts for the most self-serving of reasons." The Foreword concluded that "what we are seeing is the result of *not more birds, but more birders*. Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

Arbib, the Editor of the publication, "does not appear to have had any actual basis for the charge" that scientists supporting DDT were paid liars, (6A) and, indeed, no names were mentioned. Arbib testified "that his comment was never intended to portray anyone in particular as a venal prevaricator; rather, it merely expressed his belief that many supporters of DDT use were spokesmen for the pesticide industry." (6A). At this point (July 1972) Arbib's general accusations came to the attention of *Times* reporter Devlin. Devlin decided to investigate. If he could pry loose some names from a guileless officer of the Audubon Society, there was a possibility of converting a petulant editorial observation into a lurid attack on the reputation of

scientists who were allegedly being paid covertly to lie by the pesticide industry. But how to go about it? Devlin knew his way around. He found a willing ally in the ranks of the Audubon Society, i.e., Roland Clement, a zealous prosecutor of those who disagreed with his version of the effect of pesticides on the growth or decline of bird life. Devlin first telephoned Arbib, the author of the Foreword to the Society's publication of April 1972, which contained the statement about scientists "being paid to lie".

Arbib was reluctant to identify any individuals as the people referred to in his article. Devlin thereupon resorted to a clever seduction. Pretending to be concerned about protecting the reputations of eminent persons who might be unjustifiably injured by the Audubon accusations, he persistently urged Arbib to furnish the names of specific individuals. The blandishments of a wily and determined journalist are difficult to resist. Nevertheless, Arbib told Devlin he did not know of anyone in particular whom he could with assurance call a "paid liar." Arbib then turned to Clement and told him of Devlin's request. Clement knew the purpose for which those names would be used in the Times story (Finding of District Court) and thereupon furnished the names to Arbib, who in turn related the names to Devlin with the warning that although these were the names the Foreword had in mind, nevertheless these scientists were not necessarily "paid liars". Indeed, Arbib told Devlin that the factual basis for the Foreword was hearsay information "that somebody was engaging in misinterpretation of the Audubon bird count data". It is quite apparent that Clement saw a unique opportunity to co-opt the New York Times as a vehicle for carrying on his own vendetta against the plaintiffs, and used Arbib as a conduit to the Times when be supplied the names to his colleague.

The remainder of the story is clearly set forth in the opinion of Judge Metzner on the motion for judgment notwithstanding the verdict rendered by the jury in favor of the plaintiffs.

> "Devlin, with the names in hand, contacted Dr. White-Stevens on August 4 and read the Foreword to him. They had a 45-minute telephone conversation which covered the whole range of the agricultural

chemical business. The testimony showed that this plaintiff was an outstanding scholar in the field of biology. Devlin was told that the statements were slanderous and scurrilous and should be checked carefully before being used. Dr. White-Stevens furnished Devlin with the telephone numbers of the other four named by Arbib although Devlin already knew that Dr. Borlaug was a Nobel Prize winner and associated with Rockefeller University, a most prestigious research institution here in New York City. This plantiff also furnished Devlin with the telephone numbers of other eminent scientists in the field of pest control who should be contacted for their views on the subject. Devlin offered Dr. White-Stevens the opportunity to publish a story on the Op-Ed page of the Times, or even write an article for the Sunday Magazine section, but this offer was never followed up by Devlin.

"Finally, Dr. White-Stevens recapitulated this conversation in a letter to Devlin on August 8 in which he furnished a list of materials for Devlin to read.

"Devlin next called Dr. Jukes on August 7. The testimony of Dr. Jukes showed that he is an eminent scientist in the area of biochemistry and regarded as an international authority on poultry nutrition. He organized the first chapter of the Sierra Club outside the state of California. Devlin told Dr. Jukes that he was working on an article predicated on information given to him by the Society to the effect that Dr. Jukes was a paid liar on behalf of the chemical industry. Dr. Jukes explained to Devlin his method of evaluating bird counts and referred to a letter written by the president of the Hawk Mountain Association. This conversation was followed up by Dr. Jukes in a letter sent to Devlin the same day.

"Devlin also spoke on the telephone to Dr. Spencer who was not a party to this action, nor did he

testify as a witness. However, Devlin's notes show that he wrote "WOW" next to the notation that Spencer called the statements in the Foreword libelous. Devlin testified on trial, "These are newsmaking names. The charges are very dramatic and newsy."

"We thus have an initial publication which was not actionable in the absence of names. The reporter pushes for disclosure of the names so that he might write a story, in a newspaper with over 900,000 daily circulation, about individuals who have been called liars in one of the Society's publications. He knows from the inception that one of the scientists being called a liar is a Nobel Prize winner. He finds out as early as ten days before publication that at least two of the plaintiffs are not in the employ of the pesticide industry, nor are they being paid by such manufacturers to lie. He is given extensive background material on the views of these persons. He is furnished with names of other scientists with whom he might check out the story. He never made any effort to consult with counsel for the *Times* as to possible liability if the story were published. There is no evidence that any of his superiors made such inquiry.

"Ten days were devoted to putting this story in shape with three different drafts of summaries sent by Devlin to his superiors for approval. Despite the warnings and the information furnished the reporter, the story appears in the newspaper as though it had been written the day after the Foreword first appeared in print and no investigation had ever been made. Dr. White-Stevens testified that after a week, he stopped reading the *Times* for any story as to the Foreword. He assumed that Devlin had checked out what he had told Devlin and that Devlin was satisfied that the story was not warranted. Great was this plaintiff's surprise when a student brought the story to his attention. He read it and found that Devlin had ignored everything he told him in the lengthy telephone conversation and in his letter to Devlin."

Judge Metzner concluded that "the jury was justified in finding clear and convincing proof from the evidence and the inferences to be drawn therefrom that the story of August 14 was published with reckless disregard of whether it was false or not." (27A-28A)

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION HAS MISCONSTRUED AND EXPANDED BEYOND ITS INTENTION THE HOLDING OF THIS COURT IN NEW YORK TIMES V. SULLIVAN AND CONSTITUTES A DRASTIC DEPARTURE FROM THE RATIONALE OF THAT CASE. THE COURT OF APPEALS DECISION BROADENS THE SCOPE OF IMMUNITY OF THE PRESS FROM DEFAMATION SUITS BY PUBLIC FIGURES TO THE POINT WHERE A SHOWING OF RECKLESS DISREGARD OF THE FALSITY OF THE LIBEL IS NO LONGER AVAILABLE TO PLAINTIFFS WHOSE REPUTATIONS HAVE BEEN DESTROYED.

Part II of the Circuit Court's opinion contains the essence of its view of the holding in *New York Times v. Sullivan* as applied to a review of the jury's verdict in the trial court. The opinion (in Part II) states as a major premise that a libel judgment against the Times is constitutionally impermissible in the face of a finding of fact that the Times "accurately reported the names of the five scientists as the "paid liars" referred to in the publication of the Audubon Society. In short, the press is immunized from a reckless libel so long as the original charges of the Audubon Society ("being paid to lie") were "accurately" reported and the individuals libeled correctly named. Leaving aside the question of whether the New York Times story which accused the plaintiffs of being "paid liars" was a mere repetition *in haec verba* within the meaning of the Court's decision, we submit that replicating libelous language does not confer automatic

immunity when the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. It is a clear misconstruction of this Court's opinion in *New York Times v. Sullivan* to maintain that the First Amendment "protects the accurate and disinterested reporting" of libelous charges "regardless of the reporter's private views regarding their validity." For it is precisely the reporter's views of validity which make the difference between whether the statement was made with knowledge that it was false (i.e. reckless disregard of falsity), or, on the other hand, whether it was mere repetition without persuasive evidence to indicate that the reporter did indeed have doubts as to its truth and nevertheless proceeded recklessly. The original accusation in the Foreword was like inert dynamite—harmless if handled with care—but if some reckless person came along with a lighted match and decided he would like to set off an explosion, no matter whether innocent persons get hurt, then we have the instant case. In *St. Amant v. Thompson,* 390 U.S. 727, 732 (1968), this Court held:

> "The defendant in a defamation action. . . cannot automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. . . Likewise, reckless disregard may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports".

In short, the Circuit Court opinion holds that the identification and disclosure in a headline in the New York Times captioned "Pesticide Spokesmen Accused of Lying. . ." is protected by the so-called "accurate reporting" of those charges. This conclusion, if sustained, would make it virtually impossible for any plaintiff to offer evidence that a New York Times statement was made with reckless disregard of its falsity. Further inquiry as to whether the reporter had serious doubts about the truth of the statement would be foreclosed *ab initio*. In fact, what was *potentially* libelous in the Audubon Foreword was exploded into a full-fledged libel by the New York Times, and this libel is now immunized by an unwarranted expansion of *New York Times v. Sullivan*.

The instant case is typical of the passions which flow on both sides of ecology and other contemporary issues. The protagonists on either side are generally scientists, physicists, chemists, environmental specialists, and, as public figures, they are fair game for character assassination under the Court of Appeals ruling herein, since recklessness on the part of journalists is virtually eliminated as a criterion of liability for libel. The consequences are enormous for the future of American journalism in terms of insuring a responsible press. A newspaper is now permitted to launch an irresponsible attack on one side or the other of a controversial public issue via the devious road of maligning an outstanding protagonist with impunity. Judge Kaufman has rewritten the *New York Times v. Sullivan* case to hold that so long as a publisher engages in "neutral reportage", he is immune to responsibility for libelous statements unless the plaintiff can show (1) that he (the publisher) in fact espouses or concurs in the charges, or (2) that he deliberately distorts these statements to launch a personal attack. (Slip Op. p. 3770). We submit that these qualifications were never contemplated by *New York Times v. Sullivan*. For by "neutral reportage" Judge Kaufman means "accurate reporting of the charges" and "accurate reporting" *alone*, according to this opinion, serves to throw a cloak of immunity around libel against public figures without the opportunity for demonstrating recklessness on the part of the defendant. The criteria for liability for defamation newly developed by the Circuit Court are clearly beyond the scope of the *New York Times v. Sullivan* holding, which is designed "to insure the ascertainment and publication of the truth about public affairs," *St. Amant v. Thompson, supra* at 731.

This Court has held that in order for it to be found that a defendant, within the meaning of the *New York Times* case, acted in reckless disregard of whether a defamatory statement which he made about a public official is false or not, there must be sufficient evidence to permit the conclusion that the defendant had serious doubts as to the truth of his publication" *St. Amant v. Thompson, supra* at 731. If the state of mind of the journalist is irrelevant, or cannot be demonstrated by circumstantial evidence

as the opinion of the Circuit Court holds, then it becomes impossible to demonstrate that the defendant entertained serious doubts as to the truth of the accusation, or that the publisher acted with a "high degree of awareness of. . . probable falsity," *Id.*

II. THE RATIONALE OF *NEW YORK TIMES v. SULLIVAN* WHICH RESTS ON (1) THE PUBLIC'S RIGHT TO KNOW; (2) THE NEED TO INSURE VIGOROUS ADVOCACY OF PUBLIC ISSUES; (3) THE NEED TO INSURE UNINHIBITED AND VIGOROUS CRITICISM OF THE CONDUCT OF PUBLIC OFFICIALS IN A DEMOCRATIC SOCIETY; (4) AND THE OVERRIDING NEED TO INSURE THE PUBLICATION OF TRUTH ABOUT PUBLIC AFFAIRS HAS BEEN UNDERMINED BY THE CIRCUIT COURT OF APPEALS DECISION HEREIN. IF THIS DECISION IS NOT REVERSED THEN FREEDOM OF EXPRESSION AND ROBUST DEBATE ON PUBLIC AFFAIRS IS SERIOUSLY JEOPARDISED.

New York Times v. Sullivan involved a libel action brought by a public official against critics of his official conduct. This Court held that to allow the plaintiff, the Chief of Police of Montgomery, Alabama to prevail, absent a showing of malice would "shackle the First Amendment in its attempt to insure the widest possible dissemination of information from diverse and antagonistic sources," *New york Times v. Sullivan, supra* at 266, citing *Associated Press v. United States* 326 U.S. 1, 20 (1944) . As Mr. Justice Fortas pointed out in his dissent in *St. Amant v. Thompson,* 390 U.S. 727, 734, "The public official should be subject to severe scrutiny and to free and open criticism." However, he went on to add, "The First Amendment is not a shelter for the character assassinator." If the public figure "is needlessly, heedlessly, falsely accused", he should have a remedy at law. As Mr. Justice Frankfurter pointed out, concurring in *Pennekamp v. Florida,* 328 U.S. 331, 354 (1946), "freedom of the

press, however, is not an end in itself but the means to the end of a free society". He continued, "a free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise" *Id.* at 355. "No institution in a democracy, either governmental or private can have absolute power" *Id.* . . . freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise". *Id.* at 356. Furthermore, the exercise of freedom of speech, stated Mr. Justice Frankfurter, "must be compatible with the preservation of other freedoms essential to a democracy". Unquestionably, the motivating philosophy of *New York Times v. Sullian* was that a pall of fear and timidity might be imposed upon those who would give voice to public criticism should they be silenced by fear of retribution in the form of libel suits for great sums of damage. It is equally clear that the decision calls for a high degree of self-restraint and responsibility on the part of the press as the price for the immunity granted by this court. For, if that responsibility is desregarded, then the balance between the right of an individual to be free of degradation as against the freedom of the press from the constraints of libel is unjustly weighted against the individual.

To those of us who are not intimately involved in scientific research, strife over the methodology of counting bird life may not seem like a matter of great urgency. However, to distinguished biologists such as plaintiffs, who have dedicated their professional careers to science, their reputations and integrity are their most precious assets. This is especially true in an age when ecology (among other public issues) has become a battleground for ideological warfare. The internecine struggle over the appropriate solutions and the formation of a rational public policy with respect to such issues as pollution, pesticides and atomic energy have inevitably created a need for an enlightened public which has access to the relevant information on these issues. The responsibility of the media has grown accordingly, since the peoples' right to know depends in turn upon the integrity of the press. They (the press) are the purveyors of information to a mass audience. To allow the media to engage in reckless distortion and malicious accusations against either

side of an ecological controversy (and its protagonists) is to deprive the public of its right to know. Although the New York Times may lend its vast resources today to one protagonist in an ecological controversy, tomorrow another newspaper, taking comfort from the Court of Appeals decision herein, may launch an attack on a proponent of a minority point of view who challenges an established position.

It is often asserted, to the point of ritual, that libel suits against the press have a "chilling effect" on vigorous debate, and thus an intimidated press deprives the public of vital information necessary to an informed electorate. However, the significant question arises as to who is being "chilled", the journalists or those who stake their professional reputation on entering the arena of critical public issues. It may well be that scientists will become more and more reluctant to engage in public debate when they are potentially subject to calumny and humiliation. If this turns out to be the case, it will become increasingly difficult to justify the philosophy of *New York Times v. Sullivan* in terms of the "peoples' right to know". We submit that articles similar to Mr. Devlin's piece in the New York Times are calculated to generate more heat than light on issues of vital importance to the American public, and the deprivation to the public of intelligent debate by concerned scientists may be the result more of media irresponsibility than the alleged chilling effects of potential actions for libel.

It is significant to note that the New York Times article presents to the public only one side of an environmental issue. The other side is damned *ad hominem* as being "paid to lie". There is a complete failure by Devlin to give the public even a glimpse of the scientific data he had received from the plaintiffs, or the caution they had urged upon him. This scarcely serves the purpose of enlightening the public or insuring "their right to know".

In short, Judge Kaufman's opinion for the Second Circuit Court of Appeals will inevitably result in the total emasculation of the law of defamation. As Professor Philip B. Kurland, of the University of Chicago Law School, suggests in *Politics, the*

Constitution and the Warren Court, (p. 64) the result of the *New York Times* case "has been the nationalization of the law of defamation, if not its destruction. The ultimate effect remains to be seen. But it must be apparent that what it means is a greater protection for the defamer and a diminution of the very small protection that was available to the defamed. Whether in this age of media control of the American mind this consequence should be regarded as wholesome is. . . dubious to me. . . The press has had few restraints imposed on its capacity to degrade individuals. As with other institutions, self-restraint has not provided enough restraint. One wonders whether the wisdom that came too late to Thomas Jefferson will not also come too late to us."

III. THE SECOND CIRCUIT COURT OF APPEALS OPINION VIOLATES BASIC CANONS OF APPELLATE REVIEW OF JURY VERDICTS AND SPECIFICALLY, THE RULE OF "RECORD EXAMINATION" TO DETERMINE WHETHER THE EVIDENCE IN LIBEL CASES CAN CONSTITUTIONALLY SUPPORT A JUDGMENT.

The District Court, in an opinion dismissing the New York Times motion for Judgment Notwithstanding the Verdict, stated in reference to Devlin, the New York Times reporter, "We have here a reporter of 25 years' experience who must have known from the outset that he was dealing with a libelous article. The reporter attended annual meetings of the Society, went on field trips, and had written several articles for the Society. He was not a novice as to the background of the story. Finally, his memory on the witness stand as to the events leading up to the publication of the story was abysmally poor and contradictory. He could not remember with any degree of accuracy to whom he spoke or the extent of the conversations". (26A)

"Devlin, with the names in hand, contacted Dr. WhiteStevens on August 4 and read the Foreword to him. They had a 45-minute telephone conversation which covered the whole

range of the agricultural chemical business. The testimony shows that this plaintiff was an outstanding scholar in the field of biology. Devlin was told that the statements were slanderous and scurrilous and should be checked carefully before being used." (27A)

Judge Metzner found that "the jury was justified in finding clear and convincing proof from the evidence and the inferences to be drawn therefrom that the story of August 14 was published with reckless disregard of whether it was false or not." (29A)

In light of the above evidence of record, it is little short of astonishing to find the Circuit Court of Appeals on review holding that "the evidence adduced at trial was manifestly insufficient to demonstrate 'actual malice' on the part of the New York Times," unless Judge Kaufman is using the term 'actual malice' in a Pickwickian sense unknown to conventional lawyers. Furthermore, it flies in the face of the record to assert that there was not "a shred of evidence from which the jury might have found that Devlin entertained serious doubts concerning the truth of Arbib's charge that the appellees were 'paid liars' ". (14A) We might accept with equanimity the upset of a jury verdict had the Appellate Court indicated that "there was a conflict of evidence"—but "not a shred of evidence" strains one's credulity in light of the weight of uncontradicted testimony before the jury. Moreover, contrary to the Circuit Court's characterization of petitioners' position, as we understand it, they do not assert "that once Devlin heard the scientists' denials and received materials explaining their general stand in the DDT controversy, he became charged with the duty to publish absolutely nothing until he conducted a full-scale investigation plumbing to the bottom of the matter". (15A) What they do assert is that Devlin knew from the outset that he was dealing with a potentially libelous article when he sought to transmute the generalized accusations in the Audubon Foreword into an indictment of named individuals and then threw them into the glaring spotlight of a major newspaper. Devlin did not have to "plumb" to the bottom of anything, except possibly his own conscience, because he was not interested in "plumbing" the merits of the controversy and enlightening the public about an environmental issue, as such. He was after a

sensational exposé and no warning would impede his recklessness once he had started down the path of destroying reputations.

Petitioners maintain correctly, as did the trial court, that there was just no basis for calling the plaintiffs "paid liars". In order to be paid, they would have had to be working for the industry which was presumably hiring their opinion; and hired guns they were not (although this is what the times story implied), since there is not any evidence whatsoever to show that any of these scientists was employed by or receiving money from the pesticide industry, and Devlin was fully aware of that before he published his character assassination.

We submit that the evidence of record could be, and indeed was found by the jury sufficient to warn Devlin of probable falsity. Moreover, the dictum of the Circuit Court to the effect that "the appellees would punish the Times for its effort to confirm the story" can charitably be called disingenuous. Devlin is not being condemned for looking, but for closing his eyes to what he saw. We concur in the conclusion of Petitioners' brief that the Appellate Court usurped the essential jury function of making a factual determination on the issue of actual malice and disregarded critical elements of the record evidence. The outer limits of appellate review of jury verdicts have been clearly exceeded by the Circuit Court of Appeals in this case, as Petitioners point out.

Finally, it is worth recalling again the underlying motif of *New York Times v. Sullivan*, which is that libel actions by public officials against critics of their conduct will restrain the press from freedom of expression so that public opinion will be unenlightened on critical issues. Surely, it is the consequences which flow from restraints on freedom of the press which are at stake in a democratic society. As Mr. Justice Felix Frankfurter indicated, "Freedom of the press is not an end in itself, but the means to an end in a free society". Indeed, we heartily concur in the opening paragraph of Judge Kaufman's opinion "that a democracy cannot long survive unless the people are provided the information needed to form (intelligent) judgments" on critical issues.

The case herein is a paradigm of the conflicts which arise in a modern industrial society over highly complex and technological issues such as, inter alia, environmental protection and the generation of electricity through nuclear fission plants; and even more esoteric to the layman, the safety of breeder reactor plants. Thus, noted scientists disagree on such vital factors as the safety and technical efficiency of nuclear energy. It is inevitable, therefore, that the public will seek to place its confidence in those scientists whom it can trust and upon whose reputation it can rely.

Consequently, the preservation of a scientist's reputation for integrity has become as vital a value in contemporary society as other values we cherish, including freedom of expression. Tragically, values often come into conflict, such as the conflict between freedom of speech and the right to a fair trial. The resolution of such conflicts lies at the heart of constitutional law, so that it becomes imperative to determine the extent to which the value of freedom of the press is diminished by a recognition of competing values. If we may repeat Professor Kurland's observation, "the press has had few restraints imposed on its capacity to degrade individuals". The ambit of freedom allowed to the press by *New York Times v. Sullivan* affords a scope for the exercise of its powers up to the very limit of sheer irresponsibility and recklessness. Beyond that point, freedom turns into license and the goal of "the widest possible dissemination of information from diverse and antagonistic sources", *New York Times v. Sullivan, supra* at 266, become defeated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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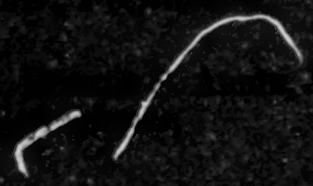

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-576

J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D., ROBERT WHITE-STEVENS, Ph.D., *Petitioners,*

v.

NATIONAL AUDUBON SOCIETY, INC., ROBERT S. ARBIB, JR., ELVIS J. STAHR, JR., *Defendants,*

and

THE NEW YORK TIMES COMPANY, ROLAND C. CLEMENT, *Respondents.*

MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

Pacific Legal Foundation hereby moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in support of the petition for a writ of certiorari to the Court of Appeals for the Second Circuit filed October 18, 1977 in the above-captioned proceeding. Consent to the filing of the brief has been withheld by counsel for Roland C. Clement.

Pacific Legal Foundation is a non-profit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. The Foundation has more than 20,000 members, contributors, and supporters throughout the United States. Policy for the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys.

The Foundation participates in and has devoted a substantial portion of its resources to cases relating to nuclear energy, pesticide regulation, public lands management and public assistance administration. In such areas, the "public interest" is frequently a subject of highly emotional debate. It has been the experience of the Foundation that public minded scientists and scholars will volunteer their expertise on both sides of such public interest issues and thereby provide perspective and basis for intelligent review and debate. Without such voluntary participation, the quality of governmental decision making will decrease and the public interest will suffer. It is the deep concern of the Foundation that the decision below will establish character assassination as an uncontrolled tool of the irresponsible as a means to deter these scientists and scholars from continuing this laudatory practice of participation in public affairs.

The accompanying brief urges this Court to grant the petition for certiorari. Pacific Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues.

Accordingly, Pacific Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae.*

Respectfully submitted,

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICUS

Pacific Legal Foundation is a non-profit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. The background and interests of *amicus* are detailed in the preceding motion for leave to file this brief.

INTRODUCTION [1]

> It is elementary that a democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their ability to intelligently govern themselves.[2]
>
> Chief Judge Kaufman

This case presents a dilemna resulting from the need to protect the dissemination of information, *i.e.*, freedom of the press, while also insuring the development and protection of sources of information, *i.e.*, individual freedom of speech. In this context, issues presented for review are:

1. Whether the Second Circuit Court of Appeals has chilled petitioners' right to speak freely and unthreatened on public issues, thereby violating their first amendment rights.

2. Whether the Second Circuit Court of Appeals has violated the seventh amendment through failure to give proper weight to fact findings of the jury.

3. Whether the Second Circuit Court of Appeals gave unbalanced pre-eminence to freedom of the press at the expense of individual freedom of speech to the detriment of the public interest.

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[1] The petition for certiorari delineates the facts and includes the opinions of the courts below. Citations are made to the Petitioners' Brief, Appendices.

[2] *Edwards, et al.* v. *National Audubon Society*, Nos. 1026/7 (2d Cir. May 25, 1977), Petitioners' Brief, App. A at 2A.

STATEMENT

The Public Interest Requires A Restatement Of *New York Times* v. *Sullivan*

In 1964 this Court declared: "The Constitutional guarantees [of the first and fourteenth amendments] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279-80 (1964). Three members of the Court, in two concurring opinions, proposed a rule of unconditional immunity from libel actions based on criticism of the official conduct of public officials.

Over the years since *Sullivan,* the courts have extended the rule of the majority opinion concerning libel of public *officials* in *official* conduct to public *figures* in their *public* conduct. However, some courts, the Court of Appeals for the Second Circuit in particular, have created such an impossible burden of proof as to malice in libel cases that the majority rule in *Sullivan* has lost legal significance and the unconditional immunity rule prevails.

A. Petitioners' First Amendment Rights

The evolution of *Sullivan* occurred to guarantee freedom of the press and to avoid the chilling effect of the threat of libel suits on public dissemination of information on public issues. While these objectives are laudatory, the process has left the first amendment rights of public figures, such as petitioners, vir-

tually unprotected with a chilling of the public discussion and debate the decisions sought to protect.

Petitioners here are noted scientists and scholars whose comments must be encouraged in the free discussion of serious scientific issues. The falsity of the statement which precipitated the suit against Clement and the New York Times, to wit, that petitioners were "paid to lie," was not questioned by the Second Circuit Court. Nothing better characterizes the significance of the libel than the Second Circuit's own description:

> It is difficult to conceive of any epithet better calculated to subject a scholar to the scorn and ridicule of his colleagues than "paid liar." It is this completely foundationless accusation of venality that constitutes the essence of the calumny against the appellees.
>
> Petitioners' Brief, App. A at 17A.

If the Second Circuit's decision is permitted to stand, petitioners, and others of similar standing, are left with the knowledge that future participation in public scientific debate may again subject them to similar calumny and to the "scorn and ridicule of [their] colleagues." Might not this knowledge create a chilling effect on participation in public debate of issues? Is there no chilling effect on petitioners' first amendment rights of free speech? Will scientists and scholars of lesser courage be likely to volunteer their expertise in public debate of serious technical issues? The unfortunate result of this decision in the name of a free press, is the sacrifice of an element of individual freedom of speech; the printed form has been elevated over informational substance.

B. Petitioners' Seventh Amendment Rights

The factual questions of malice were submitted to a jury. Actual malice was found in the case of Roland C. Clement; the New York Times was found to have acted with reckless disregard of whether or not the article published was false. These jury decisions followed review of evidence including testimony of witnesses and observation of their demeanor and attitude. In response to motions for judgment *n.o.v.,* the District Court reviewed the evidence and the jury's findings and concluded that the verdicts were proper and consistent with the evidence. The Court of Appeals, accepting some of the jury's findings, substituted its own judgment and, despite the District Court's review, concluded that there was insufficient evidence to support the jury findings.

It is conceded that the appellate court has the right to review the evidence to ensure that, as a matter of law, there was no error made below. The seventh amendment, however, precludes re-examination of facts tried by a jury except in the manner described in *Sullivan.* 376 U.S. at 285 n.26. The Court of Appeals' overturning of the jury verdict is an unwarranted rejection of circumstantial evidence of malice in libel cases which does violence to the seventh amendment and to the evidentiary review exemplified in *Sullivan.*

C. Proof of Malice in Libel Cases

The Second Circuit extended its elimination of malice in libel cases involving public figures when, on November 7, 1977 it supported the right of a news reporter to refuse to respond to cross-examination

concerning his state of mind at the time of his libel.[3] Public figures now find themselves in an impossible position: they may sue for libel only when they can establish malice pursuant to the *Sullivan* majority opinion but are not permitted to submit circumstantial evidence to a jury for determination of malice or to establish malice through interrogation of the author of the libel. In short, a public figure will have a sustainable suit for libel only in that rare case when the libeling partly publicly proclaims his malice. If however, the libeling party publicly declares that he speaks without malice and if the libeling party has the foresight to merely acknowledge that his victim disagrees with his libelous statements, while providing no rebuttal of the factual allegations of the libel, that party will be secure from any libel suit and may even earn the plaudits of the Second Circuit as "the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy contretemps." (Petitioners' Brief, App. A at 14A.).

The special duty that "public officials" owe to the public and the need for close scrutiny to avoid official misfeasance might well justify the minority concurring opinions in *Sullivan,* as applied to those specific facts. However, it is doubtful that even the *Sullivan* minority would have applied the unconditional immunity rule to "public figures" who volunteer their expertise in public debate of important issues. Public figures who seek to benefit the public through participation in informational public debate should not be left totally unprotected from the calumny of detractors or the wanton disregard of truth that may result

[3] *Herbert* v. *Lando,* No. 77-7142 (2d Cir. Nov. 7, 1977).

from zealous but irresponsible reporting. It is not suggested that public figures are entitled to immunity from unfair criticism. It is submitted that there is a vital public need for balancing freedom of the press with freedom of speech.

Whether it is freedom of the press or freedom of individual speech that is repressed, freedom of full discussion of issues is chilled and the public loses. The original rule of the *Sullivan* majority provides a measure of protection to a public figure and strikes a balance between freedom of the press and individual freedom of speech. Public debate of issues will be fostered in an atmosphere which encourages both responsible journalism and the development of technical and scientific information from public figures.

SUMMARY

Granting of the petition for certiorari in this case is essential if the Supreme Court is to breathe new life into the majority opinion in *Sullivan.* If this is not done, a public figure who values his reputation will have no recourse other than to remain silent except, perhaps for the alternative described in an article in the November 30, 1977 Washington Post, entitled "Judge Says Fighting Is Only Libel Remedy." (Reproduced in Appendix A.) While the title of the article somewhat exaggerates the actual statement of Judge Brieant, it exhibits the public frustration over the trampling of one set of constitutional rights in the name of another. Re-examination of *Sullivan* is in the public interest.

CONCLUSION

It is respectfully requested that this Court grant the petition for writ of certiorari.

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APPENDIX

THE WASHINGTON POST Wednesday, Nov. 30, 1977 D 11

Judge Says Fighting Is Only Libel Remedy

By Jerry Knight
Washington Post Staff Writer

Recent libel law rulings have so limited the right to collect damages that public figures may have to "resort to fisticuffs or dueling" to get satisfaction, a federal judge in New York says.

"Practical litigants may well conclude that any remedy for libel against a journalist by a public figre is now illusory," decreed Judge Charles L. Brieant.

Brieant, a federal judge in the southern district of New York, made the comment last week when he dismissed a $37.5 million libel suit against Barron's magazine.

Barron's was sued by Reliance Insurance Company after the magazine criticized a stock offering by the company in July, 1976.

Reliance claimed the critical story forced it to raise the dividend rate on the preferred stock offering by one percentage point, thus costing $7.5 million over the life of the issue. It asked an additional $30 million in punitive, special and general damages.

After months of legal maneuvering and "a mound of paper, submitted by both sides" Judge Brieant issued a summary judgment in September that dismissed the case without a trial. He upheld that decision last week.

In his latest decision, the judge said he threw out the case because Reliance Insurance "will be unable at trial to prove actual malice."

Noting that several court decisions have required public figures to prove malice before they can collect damages, Brieant linked his decision to the case of Army Lt. Col. Anthony Herbert against CBS television. Herbert, who accused two of his superior officers in Vietman of committing war crimes, sued CBS after he was the subject of a 1973 Mike Wallace program.

The U.S. Second Circuit Court of Appeals in New York earlier this month dismissed Herbert's libel suit, ruling that he could not ask CBS officials about their "state of mind" when they produced a program about the controversial officer.

Acknowledging it was "breaking new ground in an area of utmost importance," the circuit court said allowing plaintiffs to question journalists about their decision making would have "grave implications for the vitality of the editorial process which [courts] have recognized must be guarded zealously."

Judge Brieant's decision apparently is the first to cite the Herbert case as precedent and to suggest that case and others virtually rule out libel suits considered by public officials.

"The level of clear and convincing proof required now in this circuit to show 'actual malice' in a defamation case is almost insuperable," Brieant said when he first ruled for Barron's.

In reaffirming that action, the judge noted that "a judicial remedy for defamation was regarded, since the earliest days of the common law, as necessary because of the 'supposed tendency (of libel) to arouse angry passion, provoke revenge and thus endanger the public peace.'

"Are men and women of honor who happen to be public figures to right vicious slanders hereafter by resort to fisticuffs or dueling?" Brieant asked rhetorically.

Brieant's ruling came in a suit over an article written by Dr. Abraham J. Briloff, a City University of New York accounting professor who, the judge noted, is known as "the Cassandra of the accountants" because of his frequent criticism of accounting practices.

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